No. 3906

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AKTIESELSKAPET BONHEUR (a corporation)
Appellant,

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY (a corporation), claimant of the American Steamer "Beaver", her tackle, apparel, engines, boilers, furniture, etc.,
Appellee.

BRIEF FOR APPELLEE.

FARNHAM P. GRIFFITHS,
McCUTCHEN, OLNEY, WILLARD, MANNON & GREENE,
Proctors for Appellee.

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4. The evidence shows that, not having approval of the Moore profiteering charter and not being permitted to berth the vessel for its own account, libelant would have allowed the "Bayard" to lie idle rather than sail her at rates which would have been approved. Consequently, libelant has not sustained its burden of proof to show that its vessel would have been employed but for the collision. Apart from burden of proof the evidence is that, regardless

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Statement of the Case.

The opinion of the District Court provides a succinct statement of the case and we quote it entire as follows (Ap. p. 303):

> "The 'Bayard' and the 'Beaver' collided in the harbor of San Francisco on November 3d, 1917. The respondent 'Beaver' admits liability for the collision and the only question left for determination is the question of damages. The cost of repairs to the 'Bayard' must, of course, be allowed. The fact that other repairs, not necessitated by

the collision, were made, but which did not delay the completion of the repairs so necessitated is, as I view the case, immaterial. The period covered by the making of the repairs was forty-eight days. It would, however, in any event have taken at least two weeks to have arranged for the acceptance by the owners, of a charter satisfactory to the Shipping Board. The 'Brazil,' a ship of the same general type as the 'Bayard,' entered San Francisco harbor on November 13th, 1917, ten days after the collision, and remained there idle until the middle of January, 1918. During all of this time Olsen & Co. of Norway, were the managing owners of both the 'Bayard' and the 'Brazil.' Moore & Co. had offered a lump sum of $400,000.00 as charter hire for the 'Bayard' for a voyage to the Orient and return, and it is on this offer that libelant bases its claim for the amount of damages sought as demurrage. But it is quite clear that a charter at that rate would not have been approved by the Shipping Board, which had fixed a basic rate of forty-five shillings per deadweight ton per month. While the 'Bayard' was laid up for repairs the 'Brazil' was also idle in port, although there was a great demand for ships and she could have sailed at any time at the rates fixed by the Board. The fact that she did not do so leads me to the belief that the owners were unwilling to accept those rates, and preferred to wait in the hope or expectation of securing a more profitable figure. They were in fact unwilling to accede to the regulations of the Shipping Board in regard to rates, and seemingly desired to take their chances of getting higher rates later by leaving the ship idle during this period. If it were not for the voluntary idleness of the 'Brazil' I would allow demurrage to the 'Bayard' at the rate of forty-five shillings per deadweight ton per month for the period of thirty-four days. But as the owners preferred to leave the 'Brazil' idle when she could have been

chartered at those rates, it is reasonable to conclude that they would not have accepted them for the 'Bayard' had she been in commission. A higher rate would not have been approved by the Board.

"A decree will be entered in favor of libelant for the amount expended in making the repairs rendered necessary by the collision. If the parties do not agree as to this amount, the cause will be referred to the Commissioner to ascertain and report the same."

Appellee, as claimant of the "Beaver", went into court admitting liability for the collision and consenting to pay the physical damages sustained by the "Bayard" as they might be agreed upon or proved, but contesting the demand for demurrage because claimant felt as the court below has found, that the "Bayard" would have been idle during the repair period, even if the collision had not occurred.

This finding was in accordance with claimant's contention in chief. Alternatively, and of course only in the event that the major contention should not have been sustained, claimant urged that in any case demurrage if awarded should be only for the then market value of the "Bayard", namely, her earning power at the basic rate prescribed by the United States Shipping Board as the *sine qua non* of its approval of the charters of neutral vessels at that time—it being admitted that without the Board's approval the "Bayard" could not have been chartered. Libelant was contending for demurrage based on a proposed $400,000 charter—far in excess of the Board's maximum. The court has

found that "it is quite clear that a charter at that rate would not have been approved by the Shipping Board".

As the court further found that

> "it would, however, in any event have taken at least two weeks to have arranged for the acceptance by the owners of a charter satisfactory to the Shipping Board"

the demurrage period whatever the rate per day of compensation for lost time (assuming any to be due) should as the court accordingly also found be for 34 instead of for the 48 days (full repair period) claimed by appellant.

We urged in argument below that, if, contrary to our first contention against any demurrage, some allowance therefor should be found due there should nevertheless be a deduction not only of 14 days (as above) but, under the authorities, an additional deduction because repairs not necessitated by the collision were carried on for owner's account concurrently with the repairs that *were* so necessitated. The court found the fact but deemed it immaterial "as I view the case" —that is, that no demurrage at all was recoverable.

So similarly a further contention we made in argument below became in the view the court took of the case (that *no* demurrage was recoverable) immaterial and naturally is not considered in the opinion. That was the contention that if demurrage should be given and should be based on the Moore charter (giving the vessel twice the value per day she would have at the Shipping Board rate) there should be a deduction for appellee's failure to use overtime or double shifts to shorten the repair period.

Appellee, as appears by its brief in this court (at pp. 2-3) clings to its original contentions that the "Bayard" would not have been idle and that the Shipping Board would have approved the charter on which appellee relies for its large claim of demurrage. That the approval was essential to any chartering of the vessel is not disputed.

The central issue, therefore, on this appeal, as the battle line is drawn by appellee itself, is whether the District Court was correct in its very clear findings that "a higher rate" (than 45 shillings per deadweight ton per month) "would not have been approved by the Board" and that appellee rather than take that rate would have kept the "Bayard" idle even if the collision had not occurred as "they were in fact unwilling to accede to the regulations of the Shipping Board in regard to rates" (Ap. p. 304).

To this central issue this brief, like that of appellee, is almost wholly devoted. Appellant excepts (Brief for Appellant pp. 48-49) to the District Court's disallowance of some six thousand dollars which it claimed in addition to the stipulated physical damages of $58,096.15. In a few paragraphs toward the end of this brief we endeavor to show that the disallowance was correct. (The items are listed at page 309 of the Apostles and disallowed by the District Court in an order at page 311 and in the Final Decree at page 312.)

If, as we respectfully urge, this court affirms the District Court on the central issue of the appeal as above outlined, no demurrage will be recoverable and our contention below and the District Court's finding

that had any demurrage been due its limit would have been set by the Shipping Board's basic rate and its time 34 days only will not concern this court; nor will the other suggested deductions—for concurrence of owner's with collision repairs and for failure to use overtime or double shifts in connection with any demurrage based on the Moore charter.

We think it will be a convenience to the court to have the main body of the brief unburdened with these considerations (to a considerable extent calculations) which may prove immaterial. For convenience of reference we have placed them in an appendix.

Coming then to the principal issue our contention was and is that the libelant (appellant) is not entitled to any damages for demurrage because the "Bayard" would have been idle during November and December, 1917, (and thus during the repair period, November 3rd to December 21st, 1917) even if the collision had not occurred. The United States Shipping Board, vested with authority in that behalf, had prescribed that neutral vessels should not sail from American ports except with the approval of its Chartering Committee, and the Chartering Committee fixed a maximum basic rate for charters which, as the court below found, was for this period 45 shillings per deadweight ton per month. But rather than accept that rate this libelant, as the court further found, would have kept the "Bayard" idle.

During the very period in which the "Bayard" was laid up for repairs, her managing owners had another vessel in the harbor of San Francisco. This was the

"Brazil" referred to in the opinion of the District Court. She was a Norwegian motorship of the same general type as the "Bayard". As the court states she

> "entered San Francisco harbor on November 13th, 1917, ten days after the collision, and remained there idle until the middle of January, 1918 * * * although there was a great demand for ships and she could have sailed at any time at the rates fixed by the Board" (Ap. p. 304).

But, recalling the term that became so familiar during the War, libelant wanted a profiteering charter for the "Bayard" and failing to receive the Board's approval of it would have kept her idle as the "Brazil" was kept idle, at a time when moving ships above almost everything were thought by the United States and her allies to be the great necessity of the hour. We all know as the inner history of that period comes more and more to be recorded, how true to the situation that thought was. Having declined to accede to the regulations prescribed by our Government as a suitable war necessity, this neutral owner now asks our courts—the courts of the country it was to all intents and purposes defying—to give it the reward it would have reaped had it been able to make the defiance effective. Eventually, seeing the futility of their hope for larger prizes, the managing owners in January, 1918, accepted time charters for the "Brazil" and the "Bayard" (which had been idle since the completion of her repairs on December 21, 1917) at approved Shipping Board rates and the two vessels sailed about the 17th of January, 1918.

Reserving for the Appendix the considerations heretofore mentioned should they become material, we respectfully urge in the main argument that

I. The decision of the District Court that the "Bayard" was not entitled to demurrage because she would not have been employed during the period of repair even if she had been in commission should be affirmed.

II. The finding of the District Court upon certain disputed items of alleged damage not included in the stipulated physical damages should be affirmed (Ap. pp. 307-313).

Appellant and appellee will henceforward be referred to in this brief as libelant and respondent.

I.

The Argument.

THE DECISION OF THE DISTRICT COURT THAT THE "BAYARD" WAS NOT ENTITLED TO DEMURRAGE BECAUSE SHE WOULD NOT HAVE BEEN EMPLOYED DURING THE PERIOD OF REPAIR EVEN IF SHE HAD BEEN IN COMMISSION SHOULD BE AFFIRMED.

A. The rule re damages for demurrage: the authorities.

We agree with libelant that the rule is *restitutio in integrum* and that restitution includes demurrage, *but only* (this proviso, though well recognized in the authorities, libelant seems to overlook) *if the shipowner prove, not absolutely, we grant, but nevertheless with reasonable certainty, that but for the collision his vessel would have been employed and at the rate of hire on which his demurrage claim is computed.* That is *his* burden

of proof. It is not, as counsel suggests, for *us* to prove that the "Bayard" would *not* have sailed on her $400,000.00 charter but for *him* to prove with reasonable certainty that she *would*—first that she would have sailed at all and, secondly, at a higher rate than the rate the government was approving.

We appreciate, as libelant contends, that in many cases, owing to difficulty of proof, the injured party may receive more than mere indemnification and that it is right that he should. The law takes care of that by requiring of him not absolute proof but proof to reasonable certainty that the vessel would probably have been employed and would probably have received the sum claimed as damages for demurrage. True, as

The Mayflower, Fed. Cas. No. 9345,

on which libelant relies, says "the certainty required is not absolute certainty but reasonable certainty"; but it *is* certainty and it is for libellant to prove it. We think a reading of this record leads to the conclusion reached by the District Court that the government of the United States would never have allowed the "Bayard" to sail under her $400,000.00 charter and further that, failing to have that charter approved, her managing owners would have allowed the "Bayard" to lie idle as they did the "Brazil".

1. The burden of proof is on libelant.

One might have thought this almost self-evident and hardly requiring citation of authorities but for libelant's contrary claim, evolved from a passing remark in an early federal case (*The Margaret J. Sanford,* 37 Fed.

151-52) that the law implies consequential loss. The case itself does not say the burden of proof is on respondent to show the vessel would not have been employed, and the United States Supreme Court has declared that the law is not so.

> "In no event can more than the net profits be recovered by way of damages; *and the burden is upon the libelant to prove the extent of the damages actually sustained by him*" (Italics ours).
>
> *The Potomac,* 15 Otto 630; 26 L. Ed. 1194.

> "That the loss of profits or of the use of a vessel pending repairs, or other detention, arising from a collision, or other maritime tort, and commonly spoken of as demurrage, is a proper element of damage, is too well settled both in England and America to be open to question. It is equally well settled, however, that demurrage will only be allowed when profits have actually been, or may be reasonably supposed to have been, lost, *and the amount of such profits is proved with reasonable certainty*" (Italics ours).
>
> *The Conqueror,* 166 U. S. 110; 41 L. Ed. 937.

So also Dr. Lushington said:

> "It does not follow, as a matter of necessity, that anything is due for the detention of a vessel whilst under repair. Under some circumstances, undoubtedly, such a consequence will follow, as, for example, where a fishing voyage is lost, or where the vessel would have been beneficially employed. The *onus* of proving her loss rests with the plaintiff and this *onus* has not been discharged upon the present occasion." (The Clarence, 3 W. Rob. 283.) (Italics ours.)

In

The Loch Trool, 150 Fed. 429,

the court said:

> "That damages for the loss of the use of a vessel while undergoing repairs made necessary by a collision will only be allowed when it is shown that she could have been profitably employed during the period of her detention for such repairs is as well settled as any rule can become by repeated decisions of the courts. The Conqueror, 166 U. S. 110, 125, 17 Sup. Ct. 510, 41 L. Ed. 937; The Potomac, 105 U. S. 630, 26 L. Ed. 1194. *And the burden of proof is upon the libelant to show the amount of such damages*" (italics ours).

See also

The North Star, 140 Fed. 263; 151 Fed. 168,

so extensively referred to and, we may assume, approved by libelant, in which the Circuit Court of Appeals for the Second Circuit takes it for granted all through that it is for libelant to show its loss, not for respondent to negative it. In the light of these authorities the practically unsupported assertion of libelant that the burden of proof is with us fails; the burden is with libelant and, as we shall show presently, has not been sustained.

2. The proof required is a showing to reasonable certainty that the vessel but for the collision would have been employed and would have earned the profits claimed.

It must be shown that the vessel would have been employed and would have earned the profits claimed.

The law will not countenance an award of damages for demurrage to a shipowner who would not have used his vessel in any event. This is but another way of saying that the shipowner claiming redress on such account must show that he was damaged by the ves-

sel's idleness. A vessel injured in an icebound harbor cannot claim damages for the period she is being repaired because use of her would have been impossible in any event, nor can an owner who is on the point of laying up his vessel for the winter claim that a collision deprived him of her use. One who has determined to keep his vessel in harbor pending certain negotiations cannot claim that a collision prevented him from sending her to sea or that her idleness after a collision deprived him of her use since he did not intend to use her even if the collision had not occurred. In all of these instances the collision may have caused physical damage to the ship but the element of damage from loss of use is lacking.

In

The North Star, 140 Fed. 263; 151 Fed. 168,

one of a fleet of vessels employed in the transportation of grain on the Great Lakes was injured late in November and was laid up for repairs. It was shown that cargoes offered to the libelant's vessels were refused because of the approach of winter when navigation on the Great Lakes was impracticable, and that one by one the vessels were being laid up for the winter. Upon this showing the Commissioner disallowed libelant's claim for demurrage, basing his disallowance

> "upon the improbability, in view of the evidence, that either of them would have been sent by their owner upon another voyage that season".

The item was allowed in the District Court but upon appeal the Commissioner's ruling was sustained. Judge Wallace of the Circuit Court of Appeals, after ex-

plaining the rule upon the burden of proof in these cases, said:

> "In ascertaining whether earnings have been lost by the owner, *the inquiry is not whether they could possibly have been made by the use of the vessel during the period for which he has been deprived of her use but is whether they would have been made.* * * * It suffices if he shows a state of facts from which a court or jury can find that there was an opportunity for him to do so and that he would probably have availed himself of it. *But if it appears affirmatively, or if the reasonable inference from the facts established is, that there was no opportunity or that he would have refused the opportunity if offered it is impossible for a court or jury to find legitimately that he has sustained actual loss*" (italics ours).

Libelant says of *The North Star* that in the Circuit Court of Appeals "the decree was modified upon *the question of fact,* but the law was not questioned" (Brief p. 12). It goes without saying that libelant's counsel did not intend this to be equivocal but it really is, as the court will perceive upon reading the two reports. The lower court allowed damages for demurrage upon the theory that the vessel belonged to a class of vessels in demand and for which grain cargoes were available. The upper court reversed the case because, conceding that grain cargoes were available for vessels of this class, the evidence showed that the libelant was refusing cargoes for its other vessels and laying them up, one by one, because of the approach of winter. Thus there was *no reasonable certainty* that libelant would have used the injured vessel. The court will observe that the extensive quotations from *The North Star* in libelant's

brief (pp. 10-12) are from the opinion of the lower court.

The case of

The Loch Trool, 150 Fed. 429,

applies the same rule to facts quite similar to those in the case now before the court. Repairs upon the "Drumcraig" were made some months after the collision, twenty-four days being required for their completion. It appeared that during the period when the "Drumcraig" was lying idle after the collision another vessel *under the same management** and engaged in the same trade, was also lying idle. This was deemed a significant fact in concluding that the owners had shown no actual loss by the detention of the ship.

> "Now in this case the libelant might have repaired its ship at once so that she would have been in condition to accept any employment offered her; but no effort was made to do so until two months after she was chartered and seven months after the collision. The most reasonable conclusion to be drawn from the fact of the long delay in commencing to make the repairs, *and the further fact, unexplained, that two vessels under the same management and engaged in the same trade were permitted to lie idle for five months after the collision, is that the Drum-craig would not have received profitable employment if she had been prepared to go to sea at an earlier date than that stipulated for in her charter of August 3, 1904*" (italics ours).

Similarly, in

The Fannie Tuthill, 17 Fed. 87,

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*The "Brazil" which lay idle in San Francisco harbor during virtually the entire period of the "Bayard's" repairs was not only under the same management but actually under the same *managing ownership* as the "Bayard".

it was said:

> "The right of the injured party to be indemnified for the loss of the use and service of his vessel during the period required for making his repairs is also recognized; but it should only include the minimum time required for that purpose, *and this should fall wholly within the season of navigation, or within which, but for the injury, his vessel could have been profitably used*" (italics ours).

In

The Wm. M. Hoag, 101 Fed. 846,

it appeared that the "Lurline" was at her dock undergoing repairs and that her owners had put another vessel in the "Lurline's" route at the time the collision with the "Wm. M. Hoag" occurred. The only effect of the collision was to continue the "Undine" on the "Lurline's" route until the latter vessel was completed; the owners then put the "Undine" on the dock for repairs. It was held that no demurrage was recoverable.

So in

The Glencairn, 78 Fed. 379,

the libelant's vessel, the "Bedfordshire", was injured in a collision in Astoria harbor for which the claimant admitted liability. Claim was made for damages on account of loss of time during the period of repair. The evidence showed that she was in the harbor for a month before the collision and had declined charters at the market rate. Her owners were holding her for a rate above the market. Judge Bellinger gave damages in the amount tendered by the respondent for the physical damages, and disallowed the claim for demurrage.

The conclusion to be drawn from these cases is, then, that it must appear not only that the shipowner could have used his ship during the period of detention but that he would have done so had she been free; and the fact that other vessels of the same kind and under the same management (and *a fortiori* is this true where there is the same managing ownership) were not in use during the period of detention is of importance in determining whether he could or would have used the vessel had she not been detained for repairs. The very striking application of this rule to the situation in the instant case (the idleness of the "Brazil" under the same management and managing ownership as the "Bayard") receives attention in the later pages of this brief.

The proof that the vessel would have been employed and would have earned the profits claimed must be made by libelant with reasonable certainty.

In libelant's brief the word might is suggestively italicized or capitalized wherever it occurs in the cases, the impression of counsel being it would seem that all that must appear is that *possibly* the vessel would have been employed but for the collision. That we submit is not the rule. The Circuit Court of Appeals for the Second Circuit said so not long ago in

The Winfield S. Cahill, 258 Fed. 318,

a case, by the way, strikingly similar in its facts to our case. Demurrage rate was demanded by the libelant according to a charter signed by the owner, but not approved by the governmental authorities of the United States and of the nations associated with it in the war

with Germany and with Austria. When it appeared that the charter not only had not been, but probably would not be, approved by those authorities, demurrage was refused altogether. *There was no reasonable probability that the vessel would have earned the charter hire.*

> "We hold it established as matter of fact that there was not even a reasonable probability of the Seguranca earning any charter money under the charter in question, either when she was in collision or during the three-day period of her repairs. On this finding the law is not doubtful. *Damages for loss of use cannot be awarded because the injured vessel might have made some profit. The question is not of the possibility of employment, but of actual loss; not what possibly could have been made, but what would have been made.* The North Star, 151 Fed. 168, 80 C. C. A. 536" (italics ours).
>
> *The Winfield S. Cahill,* supra.

And in *The North Star,* cited at the close of the foregoing excerpt, Circuit Judge Wallace said:

> "In ascertaining whether earnings have been lost by the owner, *the inquiry is not whether they could possibly have been made by the use of the vessel during the period for which he has been deprived of her use, but is whether they would have been made*" (italics ours).

And he continued:

> "As it cannot be proved that they would have been certainly made, except when the vessel has a pending engagement for her profitable use during the period of detention, it suffices if the fact is proved circumstantially and *with a reasonable degree of certainty.* The inquiry is determined by the same rules of law which obtain when the owner

> of any other kind of property seeks compensation for the profits lost by the wrongful interruption of its use. The Baltimore, 8 Wall. 377, 385, 19 L. Ed. 463. It is necessary for him to show by direct evidence that he would have employed his vessel or his property during the period in such a way that earnings would have accrued to him. In many cases this would necessitate proving his intention at the time, and this might be impossible. It suffices if he shows a state of facts from which a court or jury can find that there was an opportunity for him to do so, and that he would probably have availed himself of it. *But if it appears affirmatively, or if the reasonable inference from the facts established is that there was no opportunity or that he would have rejected the opportunity, if offered, it is impossible for a court or jury to find legitimately that he has sustained actual loss''** (italics ours).

"Actual loss and reasonable proof of the amount" are the requirements of Dr. Lushington in

The Clarence, 3 W. Rob. 283.

"Reasonable certainty" are the words used by Mr. Justice Brown in

The Conqueror, 166 U. S. 110; 41 L. Ed. 937,

and by Judge Ross in

The Tremont, 161 Fed. 1, C. C. A. (Ninth Circuit).

> "Not speculative and mere possible profits * * *. Its source must be ascertained and its extent de-

*The last sentence is peculiarly pertinent to the "Bayard"-"Beaver" case because the reasonable inference from the evidence is that drawn by the District Court that the "Bayard's" owners would not have had an opportunity to send her out under the $400,000 charter and that they would have rejected, and indeed until well into January, 1918, did reject, the only opportunity which has been shown with reasonable certainty to have been available, viz.: chartering at the Shipping Board's approved rate of forty-five shillings per dead weight ton per month.

fined and its realization must appear to have been reasonably certain'',

is the rule in

The Mayflower, F. C. 9345,

to which libelant's brief makes considerable reference.

Furthermore, whatever the probable earnings are proved to be, some discount must be made in fixing the demurrage award. The reason for this is well explained in

Roscoe on Damages in Maritime Collisions, (1st ed.), p. 82:

> ''The earnings, whatever they may be, must also be discounted by a sum in respect of expenses saved as well as of risk not incurred, and wear and tear saved. To award as damages a sum for actual net earnings without any deduction in respect of the above-mentioned elements, would be akin to giving the interest arising from a speculative investment on a trustee security. In the one case, risks have to be run, contingencies and wear and tear of the machine incurred; in the other, there is no risk, and little or no wear and tear, for the ship is safely in port. As to the rate which should be deducted, it would be misleading to formulate any rules, varying as the facts necessarily must in every case.''

B. Libelant has not sustained its burden of proof to show with reasonable certainty that the ''Bayard'' would have been employed under the Moore charter but for the collision. On the contrary, the evidence is that she would have been idle during the repair period had the collision never occurred.

Our points here are: (1) that the Government of the United States, under the ample justification of war

necessities, controlled all neutral vessels in American ports in November and December, 1917, exercising such control through the Shipping Board and the War Trade Board, and that no neutral vessel could sail from an American port without the approval of the Chartering Committee of the Shipping Board; (2) that a chief and commendable point and purpose of this salutary control was to reduce mounting charter rates and put a stop to profiteering in shipping; (3) that libelant has not shown with reasonable certainty as the rule requires (and therefore has not sustained its burden of proof) that the profiteering charter which it relies on to support its claim for damages would have been approved by the Chartering Committee—that apart from burden of proof the evidence is that that charter would have been disapproved,—further that libelant has not shown with reasonable certainty, or indeed at all, that the berthing of the vessel for owners' account (to which counsel incidentally refers, though we do not understand him to make claim for damages based thereon) would have been approved, the evidence again being that, apart from burden of proof, that plan would have been disapproved; (4) that the evidence shows that, not having approval of the Moore charter and not being permitted to berth the vessel for its own account, libelant would have allowed the "Bayard" to lie idle rather than sail her at rates which would have been approved and that, consequently, libelant has not sustained its burden of proof to show that its vessel would have been employed but for the collision,—that, moreover, apart from burden of proof, the evidence

is that regardless of the collision, the "Bayard" would have been idle during the period in question.

To these points in the order mentioned we now ask the court's attention.

1. The Government of the United States, under the ample justification of war necessities, controlled all neutral vessels in American ports in November and December, 1917, exercising such control through the Shipping Board and the War Trade Board. No neutral vessel could sail from an American port without the approval of the Chartering Committee of the Shipping Board.

The Chartering Committee of the United States Shipping Board was composed of three members, Welding Ring, J. B. Smull (now President of the United States Shipping Board Emergency Fleet Corporation) and Lieutenant-Commander Daniel Bacon. Ring was appointed September 15, 1917, (Ap. p. 217), Smull on October 1, 1917 (Ap. p. 187), and Bacon about October 3, 1917 (Ap. p. 217). Commander Bacon resigned the latter part of November, 1917, and his place was filled by A. C. Fetterolf (Ap. p. 187). At first the Committee endeavored to handle the whole work as a Committee, but by the time Mr. Fetterolf took office, Mr. Ring was in charge of the sailing vessels, particularly those on the Pacific Coast (Ap. p. 188), Mr. Smull had taken control of steamers and steamer chartering so that the "Bayard" would belong to his province and Mr. Fetteroff was assigned the eastern sailing vessels (Ap. p. 188).

Instructions concerning their duties were received directly, first by word of mouth, then by letter, from

Mr. Hurley, Chairman of the United States Shipping Board (Ap. p. 189). From the testimony of Mr. Smull their general instructions were as follows (Ap. p. 189):

> "We were to have supervision of all charter parties carrying goods to and from this country in vessels under all flags, the charter parties were not to be approved until all the conditions of the charter party met with the approval of the Chartering Committee. In addition to this we were to have the approvals of all voyages where no charter party existed. For instance, a man would load his vessel and before that vessel could sail he would have to have the approval of the Chartering Committee for that voyage. This gave us direct control over all the shipments from this country to foreign countries."

For the enforcement of the policies agreed upon, the War Trade Board and the Chartering Committee worked together. This appears from the deposition of Mr. Smull (Ap. p. 190):

> "Q. Were you working in connection with the War Trade Board from the beginning? A. From the first day that we took charge we were working with the War Trade Board in the matter of their granting all the licenses for bunkers and stores on steamers and sailing vessels.
>
> Q. What was the practice between your Board and the War Trade Board as to the issuance of bunker licenses? A. From the start until today it has been the rule of the War Trade Board not to grant a bunker license to a sailing vessel or a steamer or motorship to a foreign port unless their records show that the charter party on the voyage has been approved by the Chartering Committee."

The Bureau of Transportation antedated the Chartering Committee by some months, for it was in active operation (though under another name) since June 15, 1917 (Ap. p. 175). Mr. Smull's description of the co-operation between the Chartering Committee and the War Trade Board is corroborated by the testimony of Mr. Richards of the Bureau of Transportation, a branch of the War Trade Board.

> "Q. What was the practice of the War Trade Board at that time in regard to granting and refusing bunker licenses to ships before the charters of the ships for which applications for bunkers were made had been approved by the Chartering Committee? A. If we knew the Chartering Committee had disapproved of a charter or voyage we would be very largely influenced by such disapproval and only grant bunker licenses if there was a particular reason developed subsequently why such licenses would be granted.
>
> Q. State whether or not you would grant or refuse bunker licenses to such ships before the charter had been approved. A. There were instances where licenses were granted through our being unaware of any action having been taken by the Chartering Committee. It has been a matter of development and growth. Our aim from the first has been to co-operate with them and perfect our working together *so that no vessel could leave without first having the charter and voyage approved by the Chartering Committee, unless there were very strong reasons which we would have to take into consideration in some particular instances.*
>
> Q. How early did the practice start? A. From the very formation of the Chartering Committee" (Ap. pp. 170, 171).

> "We, from the very first, attempted to secure daily advices from them of all approvals and disap-

provals, which information was placed on our files, so that when an application came before us, if we had any record of any action by the Chartering Committee, such information was seen by us'' (Ap. p. 178).

The ''Bayard'', it may be remarked, belonged to a class of vessels which the local agents of the War Trade Board in San Francisco were not empowered to license, but were instructed to refer to Washington before granting clearance papers (Ap. pp. 176-177).

The term ''bunker licenses'', as it was used in the foregoing passages, was explained in more detail by Mr. Cory, Assistant Agent of the War Trade Board at San Francisco, to mean fuel oil or fuel coal, food stores, engine stores and all other supplies taken on board the steamer (Ap. p. 51).

The Chartering Committee lost no time in getting to work. The members realized from the start that the task was large, but all of them were experienced men and they knew the ends to which they must work. Mr. Smull testified on cross-examination:

> ''Q. Of course, when you first came together it was necessary for you to organize and to work out some theory, wasn't it? A. Yes.
>
> Q. It took you some time to do that before you settled down? A. No, sir.
>
> Q. It did not? A. No, sir.
>
> Q. Had you worked out all your plans before November? A. The plans that we laid out were the scrutinizing of all charter parties, the rates and conditions of charter, and then followed in a few days the establishment of maximum rates. *That was the first thing we did, that we took up immediately and established maximum rates on time*

charters, and maximum rates on coal, and maximum rates on nitrates, etc." (Ap. pp. 217-218).

The method of examination of charters was described by Mr. Smull as follows:

"Q. When any individual charter was presented to the Board, say up to November 3rd or along into November, was the individual charter scrutinized and individual judgment given upon it? A. Yes, sir.

Q. There was no fixed rule applying to all charters that came in, was there? A. Yes, sir.

Q. In what respect? A. The charters as they came in were all placed before the secretary of the Board who tried to ease our labors as much as possible by pointing out by ringed pencil marks the ports, loading ports, destinations, rates, charterer's names, and such as that; then the charters came from his desk to the room of the Committtee, and each charter from the inception of the Committee until today has been read and looked over by each member of the Committee. When we go into session we sit around the table and examine each charter party and then the charter parties are put in a pile for the chairman and then they are taken one by one and acted upon. In cases where we have not the charter party the full conditions of charter expressed in telegrams are acted upon, or in cases where there are letters presented, the charter party made in error, we act on the letter" (Ap. p. 219).

This is the testimony of Mr. Smull showing the methods in use at headquarters in New York City. From this side of the continent we have evidence of the effective control of this Committee from those who co-operated in carrying out its policies and from those who were obliged to conform to them.

Mr. Cory, of the Bureau of Transportation of the local War Trade Board in San Francisco, testified as follows:

> "Q. What, describing them briefly, are the functions of the Bureau of Transportation of the War Trade Board? A. The functions are to license, to control operation of the vessels, of all vessels of any country going out of the port, of any port in the United States, going foreign, in such a way as to regulate the use of them to the best advantage of the United States during the war" (Ap. p. 50).
> * * *
>
> Q. Was it necessary on November 3, 1917, that a neutral vessel, a Norwegian neutral vessel, should have a permit from the War Trade Board in order to get bunkers? A. Yes.
>
> Q. How would that permit be secured? A. Usually the broker that handles the vessel files a formal application with the War Trade Board or the branch—that is usually filed at the branch office but in some cases it is filed by the owners in Washington and New York and the branch office is advised accordingly to issue the license or withhold the license depending upon whether or not the application is approved or disapproved.
>
> Q. Would an agreement be exacted from the owners or their representatives in order to secure bunkers after the application? A. Several agreements would be exacted" (Ap. pp. 50-51).

But this license was not granted as a matter of course upon the application for bunkers. On cross-examination it was suggested that it was so granted. Mr. Cory's answer was as follows:

> "No, the fact that that agreement was signed was not necessarily an agreement that he would get a license. If the Shipping Board or Chartering Committee did not approve that voyage, or if the War Trade Board did not approve the voyage,

did not approve the character of the return cargo he would not get it" (Ap. p. 61).

The San Francisco agent of the owners of the "Bayard" knew perfectly well that the approval of the Chartering Committee was necessary for the charter which was offered to the "Bayard" just prior to the collision. He testified as follows: (Ap. p. 114).

> "Q. Was the Government interfering in anywise with the 'Bayard' at that time? A. No, *other than the charter would have to be submitted for approval;* that is all.
>
> Q. If you put her on dock she would not have to submit anything for approval? A. *The same procedure would have to be gone through, subject to approval of the Shipping Board.*" (Italics ours.)

Then counsel gave his witness opportunity to modify his previous answer by asking:

> "Q. If you put her on the dock?"

To which the witness replied:

> "A. On the berth, at the time they were not interfering very much, when it first started" (Ap. p. 114).
>
> "Q. You proposed to submit this particular charter with Mr. Moore to the Shipping Board, didn't you? A. We did.
>
> Q. And you understood that you would have to have the approval of the Shipping Board of that charter before the vessel could sail? A. That was the general understanding that all the charters were to be submitted to the Shipping Board for their approval" (Ap. pp. 121-122).

Libelant's witness, Mr. Arthur Page, confirmed the testimony that the Chartering Committee at headquarters exercised direct control over all approval of charters.

"Q. Let us have this clearly understood: These approvals of charters were not done here by the local office of the Shipping Board at all were they? A. No.

Q. So all the talk about the disorganization here had nothing to do with that feature of the situation? A. No.

Q. The approval was submitted to the Shipping Board at Washington? A. Yes.

Q. Was approved there by the Chartering Committee or disapproved? A. Yes.

Q. And the local board here as soon as there were fixed rules they had the administration of them did they not? A. The approval always came from over there by telegraph" (Ap. p. 37).

Libelant's witness, Mr. Moore, also testified on cross-examination that he expected to submit to the Shipping Board his offer to charter the "Bayard" (Ap. pp. 19-20).

For further evidence of the control exercised by the United States Government over neutral ships in American ports we refer the court to the agreements signed by the agents of the "Brazil's" and "Bayard's" owners in San Francisco when the ships finally sailed (Ap. pp. 66-107). These agreements which for some months had to be made by all owners of neutral ships comprised, among other things, a guarantee given to the Collector of Customs that the ship would proceed upon the given voyage, would return directly to the United States and on return discharge all her cargo in ports of the United States; second, an application, directed to the Bureau of Export Licenses, for a bunker license; third, an application to the Collector of Customs, for a license for ship's stores, "per attached list". The

licenses named the ship and described the voyage upon which she was about to depart.

We have set out in detail the organization of the governmental agencies, established weeks before this collision, which sought to control all vessels in American harbors. The effectiveness of their control was recently recognized by the Circuit Court of Appeals of the Second Circuit in a case involving demurrage.

In

The Winfield S. Cahill, 258 Fed. 318,

damages were awarded to the "Seguranca" by the District Court for three days' loss of time while undergoing repairs caused by a collision. At the time of the collision, the "Seguranca" was under charter. *But this charter had not been approved by the necessary governmental agencies, and it further appeared that the vessel would never have been allowed to get a cargo as she had been "black-listed".* The District Court allowed the demurrage claim but on appeal the award was reversed, all demurrage claims being refused on the ground that the libelant had failed to prove even a reasonable probability that the charter hire would have been earned.

2. A chief and commendable point and purpose of the salutary control which the Chartering Committee of the Shipping Board was exercising over neutral vessels was to reduce mounting charter rates and put a stop to profiteering in shipping.

The Chartering Committtee had in view various objects. Control over the shipment of essentials and the prosecution of voyages for essential purposes was

one (Ap. pp. 171, 189, 190, 192, 50, 51). Addition to the trade of the United States and, in those anxious times when so much depended on shipping, the retention of as many neutral ships as possible in that trade was another (Ap. p. 194).

But to no object did the Chartering Committee give more earnest attention than the praiseworthy program of putting a stop to profiteering in freight rates. Mr. Smull testifies:

> "Q. Were there any particular abuses which were designed to be corrected by the appointment of this Chartering Committee? A. I don't know whether you can call it abuses.
>
> Q. Practices? A. The chief practice the Government did not like was the continual advancement of freight rates to leave this country.
>
> Q. One of the objects was to obtain a leveling of those rates downward, to have it uniform? A. There was not any discussion about it but that was what I always understood, that was the worst feature" (Ap. p. 229).

The establishment of maximum rates was indeed one of the first things undertaken by the Committee upon its organization. This was very soon after the first of October.

> "The plans that we laid out were the scrutinizing of all charter parties, the rates and condition of charter and then followed in a few days the establishment of maximum rates. *That was the first thing we did, that we took up immediately, and established maximum rates on time charters,* and maximum rates on coal and maximum rates on nitrates, etc." (Ap. p. 218).

Happily, success attended this effort to end profiteering in freight rates. The time charter rate was reduced

from sixty to thirty-five shillings, and this in the course of a few months (Ap. pp. 33, 217, 245). Of course, standardizing the time charter rate affected the freight rates to the shipper. Libelant's witness, Mr. Page, admitted this when he said "the freights, before they were interfered with, were very high, and they would very likely have gone higher" (Ap. p. 26).

5. Libelant has not shown with reasonable certainty as the rule requires (and therefore has not sustained its burden of proof) that the charter which it relies on to support its claim for damages would have been approved by the Chartering Committee—and apart from burden of proof the evidence is that that charter would have been disapproved. Nor has libelant shown with reasonable certainty, or indeed at all, that the berthing of the vessel for owner's account, to which counsel incidentally refers though he makes no claim for damages based thereon, would have been approved, the evidence again being that, apart from burden of proof, that plan would have been disapproved.

(a) *The reason for a basic rate in terms of tonnage and time.*

Libelant bases its claim for damages for demurrage on the offer of the so-called Moore charter. This was a lump sum or gross form charter for $400,000.00 for a round trip from San Francisco to two or more ports in the Philippines and return. Libelant has not shown with reasonable certainty—indeed has not shown at all—that that charter would have received the required approval of the Shipping Board. Therefore

libelant has not sustained its burden of proof. But aside from the burden of proof, the evidence is positively that that charter would have been *dis*approved. And why? Because that charter rate was at least double the maximum basic rate which the Shipping Board was allowing. We have pointed out in earlier pages of this brief that a foremost object in the Shipping Board's program was to reduce freight rates. To do this, of course, it had to reduce charter rates, as otherwise the necessary margin of profit would not be preserved for the charterer. The simple plan for this, and the one in fact adopted by the Chartering Committee of the Shipping Board, was to fix a basic rate. And obviously the only basic rate capable of practical administration was one expressed in terms of tonnage—that is to say, an allowance of a designated charter hire of so much per ton of the ship's capacity. Such a basic rate could be applied to all ships regardless of their size. But that also normally involved insisting on the time charter as against the lump sum charter. For the basic rate, to be applied as a practicable plan, had to be expressed, not only in terms of *tonnage,* but also obviously in terms of *time*—so much per ton per month. A brief inspection would readily reveal to the Shipping Board in normal cases whether a particular charter conformed to this basic rate. The plan eliminated inquiry into the tonnage of the vessel or the length of her proposed voyage. Whatever the tonnage and whatever the time element, the *rate* was so much per ton (45 shillings for the period here under consideration) per month. On the contrary, there could be no basic rate for lump sum charters *per se*—

that is for charters where a lump sum was paid by the charterer to the owner of a vessel for a designated voyage because ships are of different tonnage and bound on voyages of different periods, and these two elements of size and time would always be disturbing factors. On the other hand, if the Shipping Board (not finding practicable a basic rate for lump sum charters *per se*) were nevertheless to approve and sanction lump sum charters generally, it would in every instance be put to the necessity of computing the lump sum rate over into terms of time charter tonnage rates. In other words, it would in every instance have to look up the tonnage of the vessel and figure the probable length of the proposed voyage and then reduce the lump sum rate into terms of tonnage per month; that is to say, to satisfy itself that the lump sum rate was the equivalent of the time charter rate; whereas, in the case of a time charter, all the Committee normally had to do was to see whether the rate per ton per month was the basic rate without inquiry into the ship's tonnage or length of voyage, which would be immaterial.

Accordingly, the Chartering Committee of the Shipping Board prescribed and approved time charters and disapproved lump sum charters with the exception that in rare instances (and we believe the only one in this record is the "Arabien", for the case of the "Transvaal" is immaterial, being months later than the period here under inquiry*) it would resolve lump sum rates into terms of tonnage and time and, if when resolved they conformed to the basic rate, give their approval.

*These cases are considered in later pages of this brief.

The Moore charter on the "Bayard" could not possibly have been approved under this rarely recognized exception, for it figures out at more than twice the basic rate.

With the foregoing by way of preface, we propose to examine the evidence and show that

(b) *Libelant has not sustained its burden of proof to show with reasonable certainty or at all that the Moore charter would have been approved, and the evidence apart from burden of proof is that it would not have been approved.*

The evidence in this connection is: first, that for the period in question the basic rate was 45 shillings per deadweight ton per month, time charter, and that this rate constituted a fixed rule of the Committee subject to no variance and insisted upon for all charters; second, that the Chartering Committee normally disapproved lump sum charters; third, that the only cases where the Committee approved lump sum charters for neutral vessels were those (a) where, the vessel being in a foreign port beyond the Committee's control, it had to approve in order to get her into an American port and there subject to the control of the Committee and (b) where, taking into account the tonnage of the vessel and the length of the proposed voyage, the lump sum rate really equalled only the basic rate of 45 shillings per deadweight ton per month; fourth, that the proposed $400,000.00 lump sum Moore charter amounted to more than twice the basic rate and could not possibly have been approved.

Reviewing the evidence on these points, we observe

First. For the period in question the basic rate was 45 shillings per deadweight ton per month, time charter, and this rate constituted a fixed rule of the committee subject to no variance and insisted upon for all charters.

Mr. Smull, the Chairman of the Chartering Committee of the Shipping Board, testified:

> "Q. One of your first determinations was fixing approximately what you considered a fair rate on these Pacific vessels of 45 shillings per ton deadweight on time charter? A. Yes" (Ap. p. 229).

And he also said:

> "Q. These telegrams speak of approvals at 45 shillings per deadweight ton per month, time charter, was that your complement at that time? A. Yes, sir, maximum rate. After we established the rate of 45 shillings there were no boats fixed over that rate; today the rate is 35 shillings, a gradual reduction from 60 shillings" (Ap. p. 217).

The maximum figure for the time here in controversy was thus 45 shillings per deadweight ton per month (Ap. p. 230).

Counsel for libelant, in cross-examining Mr. Smull, sought to show that the basic rate was not uniformly insisted upon by eliciting from the witness the fact that each "individual charter (was) scrutinized and individual judgment given upon it" (Ap. p. 219) and the admission that "you can't make a fixed rule on all charters; every charter that comes in differs a little bit" (Ap. p. 220). But this absence of fixed rule on all charters did not go to the matter of *rates;* other clauses, conditions and terms might vary so that it could be said with truth that "every charter that

comes in differs a little bit" but the maximum rate, once settled, was always insisted upon as a standing rule not open to discussion. On this Mr. Smull is positive and explicit:

> "Q. You have spoken of disagreements amongst the members about time charters, did those relate to the allowance of higher charters which amounted to higher rates as they worked out more than 45 shillings on the Pacific? A. No, no differences in rates, what different clauses would give the charterer more of a concession, or owner more of a concession, *but the rates were agreed upon; we have never had a discussion over rates until there came to be a general discussion, when it looked as if the rate should be lowered or raised, but when the rate was once decided on that was the basic rate;* but a charter party would come in, several charter parties have come in with the same rate but they will have all sorts of clauses rung in that affect the rates, affect the conditions, that is where there would be arguments pro and con as to whether those clauses should be allowed to stay in.
>
> Q. Whether the particular clauses amounted to an increase in rates? A. Yes, you would be surprised to find out how many things were rung in" (Ap. pp. 230-231) (italics ours).

And again Mr. Smull testified in this connection:

> "Q. One of your first determinations was fixing approximately what you considered a fair rate on these Pacific vessels of 45 shillings per ton deadweight on time charter? A. Yes.
>
> Q. Was it part of your policy therefore not to favor charters which worked out at higher figures, or berthings that worked out higher figures? A. Yes, anything that we thought would control the situation we adopted that plan" (Ap. pp. 229-230).

Counsel for libelant reviews Mr. Smull's testimony in part only at pp. 19-21 of appellant's brief and thus loses the vital point that the individual consideration of charters as they came to the committee were concerned not with the rate but with other matters. Mr. Smull shows clearly, if all his testimony be read, that the rates were fixed unalterably.

It was the time charter at this basic rate that the Committee preferred; no doubt because, as we have already pointed out, it saved the necessity of resolving other forms of charter into terms of tonnage and time to see whether the rates conformed to the basic rate which was imposed so that freight rates to shippers could be kept within bounds and still allow a fair margin of profit to the charterer. Thus Mr. Smull testified:

> "Q. In the end of October or early in November was there any existing practice of the Chartering Committee with regard to the approval or non-approval of lump sum charters from the West Coast of this country to the Far East on neutral vessels, including Norwegian? A. *We endeavored from the start to get all neutral boats on time charter* to reputable American houses for round trips Pacific and round trips in the Atlantic; that is, when the boat was in this country and was to load to a foreign port and return from that foreign port to this country.
>
> Q. In relation to that practice what was the practice of the Committee with regard to the request for approval of lump sum charters on neutral tonnage, auxiliary motor schooners or steamers from the West Coast to the Philippines or China, Japan and Australia? A. When you say lump sum charters, I presume you mean lump sum charters on gross form charters, where the

charterer pays so much for the freight room and the owner pays all other expenses including the loading and discharging of the cargoes?

Q. Yes? A. We did not favor the gross form of charter" (Ap. p. 191).

As to reasons Mr. Smull said:

"Q. Perhaps you will explain your reasons why you were trying to get the boats on time charters instead of approving gross form or lump sum charters. A. If steamers were approved for time charter it gave the Shipping Board direct control over what that boat should take in the way of rate and the cargoes she carried, and the commodities she should carry. We were at that time very short of certain commodities that were needed for war purposes, and in regulating the time chartered rate to a lower basis than prevailing on the Pacific we could then go to the time charterer and say he would have to take certain commodities at a certain rate, allowing enough leeway between the charter and the freight, both to and from the foreign country so the rates would be considerably lower than they were, so that gave us the power to regulate the port he should go to under the time charter; he would go to just the port we knew there was cargo, to take that in the interest of this country" (Ap. p. 192).

The owners of several neutral ships trading in the Orient refused to charter them on a time charter basis. These ships were allowed to come to the United States on the gross form of charter because the Shipping Board realized that once they entered an American port they could be forced to take the time charter rate.

"Q. Was the reason of the policy the desire to get control of neutral tonnage so that it could be required to return to United States ports? A. *In order to get them on time chartered basis, and hav-*

ing the control of the boat in a United States port we could force them to take the time charter terms.

Q. Force them to return here? A. And when the time charter is made it is made for a round trip, out and home again.

Q. So that the continuation of the neutral tonnage in our trade was part of that policy? A. Yes" (Ap. p. 194).

Thus it follows that—

Second. The Chartering Committee normally disapproved lump sum charters.

We advisedly say *normally* because, as heretofore indicated, the Committee occasionally went to the trouble of resolving lump sum charters into time charter tonnage terms and approving if, so resolved, they conformed to the basic rate. Usually, however, the Committee insisted on time charters. It did not want to be bothered with lump sum charters. An exception occurs in its indication of willingness to approve a lump sum charter on the "Arabien"—but the lump sum, as we shall later point out, was not in excess of the basic rate which was always required. In a moment we shall show that the proposed Moore charter was double the basic rate and could never have been approved. The normal attitude of the Committee toward lump sum charters is shown by the following excerpts from Mr. Smull's testimony:

"Q. * * * what was the practice of the Committee with regard to the request for approval of lump sum charters on neutral tonnage, auxiliary motor schooners or steamers from the West Coast to the Philippines or China, Japan and Australia? A. When you say lump sum charter, I presume you mean lump sum charters on gross form charter, where the charterer pays so much for the

freight room and the owner pays all other expenses including the loading and discharging of the cargoes?

Q. Yes. A. We did not favor the gross form of charter'' (Ap. p. 191).

Counsel for libelant endeavors to make much out of Mr. Smull's testimony that he did not *think* the Chartering Committee would have approved the Moore $400,000.00 lump sum charter. Mr. Smull's statement in this connection was:

''Q. It has been testified to in this case that a firm of merchants in San Francisco made an offer to the agents of the ship in San Francisco of $400,000 for the round trip from San Francisco to two ports in the Philippines and return to San Francisco, and that this offer was under consideration at the time of the collision, out of which this controversy arises, which ocurred on November 3rd; was the practice of the controlling Committee at that time such that in any reasonable trade this offer would have been approved if accepted by the owner? A. *I don't think it would,* but I want to qualify that by the statement that we have never said as a Committee what we would do until the charter was put before us.

Q. But in accordance with the practice that had been in vogue up to that time would this in normal course of procedure have been likely to have met with the approval of the committee? A. No. Our records show no approval to any Norwegian boat at that time'' (Ap. pp. 192-193).

Counsel claims this shows that the Moore charter *might* have been approved. That, if true would not sustain libelant's burden of proof to show with reasonable certainty that the Moore charter *would* have been approved. But, apart from burden of proof,

the *later* evidence is positively that the Moore charter could not have been approved. Mr. Smull in the statement quoted was giving his opinion that normally the Moore charter would be disapproved because it was for a lump sum. He would not say unequivocally that it would be disapproved on that ground. But no lump sum charter would be approved if, resolved into terms of tonnage and time, it exceeded the basic 45-shilling rate. The last quoted testimony was given early in Mr. Smull's deposition. His attention was not then directed to the question whether the lump sum was in conformity to the basic rate, and when asked later on whether the Moore charter would be approved if it should work out at more than the basic rate he was perfectly positive that it would not.

> "Q. One of your first determinations was fixing approximately what you considered a fair rate on these Pacific vessels of forty-five shillings, per ton dead weight on time charter. A. Yes.
>
> Q. Was it part of your policy therefore not to favor charters which worked out at higher figures, or berthings that worked out higher figures? A. Yes. Anything that we thought would control the situation we adopted that plan.
>
> Q. This offer that has been testified to of $400,000 for a round trip would of course have worked out a much higher figure than your forty-five shilling time charter? A. I haven't figured it off-hand but I think it would, considerably.*
>
> Q. It would have been figured if you had an application for approval? A. Yes.
>
> Q. *Whether approval had been sought and would have been granted would have depended on how the*

*As we show later, the Moore $400,000 charter would work out at more than double the basic 45-shilling rate.

rate worked out as compared with your forty-five shilling time charter? A. Yes, sir.

Q. *Which was your maximum figure at that time?* A. *Yes''* (Ap. pp. 229-230).

In other words, Mr. Smull, when asked early in his deposition without reference to the relation of the figures to the basic rate whether the Committee would have approved a lump sum charter on the "Bayard" said it probably would not because it was lump sum.

> "* * * we didn't want it on gross charter at all, we wanted it on time charter" (Ap. p. 235).

But asked whether that lump sum charter, if it involved rates above the basic rate, would be approved he said positively it would not. As a lump sum charter it would *probably* not be approved; as a lump sum charter exceeding the basic rate it *certainly* would not. We shall show presently that the Moore charter went far above the basic rate. Libelant therefore fails to sustain its burden of proof; and apart from burden of proof the evidence is that the charter on which it depends would not have been approved.

It has we think been shown, first, that for the period in question the basic rate was 45 shillings per deadweight per month, time charter, and that this rate constituted a fixed rule of the Committee subject to no variance and insisted upon for all charters; secondly, that the Chartering Committee normally disapproved lump sum charters. We shall now endeavor to show that—

Third. The only cases where the committee approved lump sum charters for neutral vessels were those (a) where, the vessel being in a foreign port, beyond the committee's control, it had to approve in order to get her into an American port and there subject to the committee's control and (b) where, taking into account the tonnage of the vessel and the length of the proposed voyage, the lump sum rate really equalled only the basic rate of 45 shillings per deadweight ton per month.

Libelant, faced with the undisputed demand of the Committee for time charters at the basic rate and its disapproval of lump sum charters, endeavors to sustain its burden of proof by the testimony of Mr. Arthur Page as to his experience with charters at the time in question (Brief pp. 19-20) and by reference to the cases of the "Arabien" and the "Transvaal" (Brief pp. 26, 29). The testimony of Mr. Page fails because it shows approval only of lump sum charters for neutral vessels in foreign ports which the Committee was trying to get to American ports where they could be controlled and placed under time charter, whereas the "Bayard" was in an American port. The proffered approval of a lump sum charter on the "Arabien" is explained by the fact that at the lump sum prescribed by the Committee ($130,000.00, on which figure the Committee insisted as against the proposed $170,000.00) the basic rate of 45 shillings would be complied with. The case of the "Transvaal" is months beyond the period to which both libelant and claimant expressly limited the investigations and is wholly immaterial and irrelevant. We now ask attention to the evidence showing how on these counts libelant has failed to sustain its burden of proof.

MR. PAGE'S TESTIMONY—APPROVAL OF NEUTRAL VESSELS IN FOREIGN PORTS AS THE ONLY MEANS OF GETTING THEM INTO AMERICAN PORTS AND THUS WITHIN THE COMMITTEE'S CONTROL.

Mr. Page thought that he had chartered a number of vessels out of San Francisco on lump sum charters during the period of the "Bayard's" detention (Ap. p. 23). Referring to his books, however, Mr. Page could only quote lump sum charters on the following vessels:

> "The Transvaal" (Danish), November 27, Hongkong and Manila to San Francisco;
> "The Kina" (Danish), November 27, Manila to San Francisco;
> "The Peru" (Danish), December 7, Philippine Islands to San Francisco.

That is to say, the only vessels which Mr. Page had chartered during this time on a lump sum basis were neutral vessels in the Orient far beyond the direct control of the Shipping Board. Mr. Smull remembered the approval of these charters by the Chartering Committee and the reasons why they were approved.

> "Q. It has been testified that approval was secured by at least two steamers, I believe of Danish registry, perhaps a third, 'The Kina', 'Peru' and 'The Arabien', for return voyages from points in the Far East to San Francisco, what do you say as to that? Do you recall those cases? A. Yes, I do because of the fact that they are all owned by the East Asiatic Company. This company refused to charter those boats from the East to the United States on a time charter basis. In order to get the boats to a United States Pacific port we had to agree to allow the boats to come

to the eastward on a gross form charter, we realizing that when the vessels once got to an American port we could control their movements through the War Trade bunker licenses. It did not seem to be possible to get the East Asiatic steamers on the Pacific Coast on any other basis. They refused time charters and we had to get them to a Pacific Coast port to control them; they were out trading in the East and we had no method by which we could detain them" (Ap. 193).

(It appears elsewhere that "The Transvaal" was intended here, instead of "The Arabien".)

After these three vessels got to Pacific Coast ports they were chartered on time charters and not on gross form charters (Ap. p. 245).

To continue with Mr. Page's testimony: examining his books for the period November 3rd to December 21st he found that he had also chartered the Norwegian vessel "Dicto" on November 20th from Seattle to the Orient and return, *but this was not on lump sum but on time charter at the forty-five shilling rate,* which he admitted was forced upon the vessel by the Shipping Board.

"Q. 'The Dicto', on the 20th of November, Seattle to the Orient and return, via Panama Canal. That was a time charter? A. A time charter.

Q. And the rate I notice here is forty-five shillings sterling per ton total deadweight. A. Forty-five shillings sterling.

Q. Do you know whether that was submitted to the Shipping Board? A. That was the first vessel which was ordered to, or was only allowed, forty-five shilling sterling; she was getting more money before *and the Government interfered there and made her accept forty-five shillings*" (Ap. p. 33).

The last lump sum charter upon Mr. Page's books for a trip out of San Francisco and return was the "Erris", an American (not a neutral) ship, which was chartered on October 13th on a lump sum charter (Ap. p. 34).

It thus appears that from October 13th to November 27th, Mr. Page had made no lump sum charter for voyages out of San Francisco and the only records he had at all of lump sum charters during all of the months of November and December were on vessels in the Orient for voyages to the United States; those charters being approved because the Shipping Board desired to get the vessels involved into the United States where they could be controlled by this Government.

Mr. Page admitted furthermore that he had had no occasion to ascertain the policy of the Shipping Board during the interval from November 3rd to December 21st as to whether or not it would have approved a lump sum charter. That policy it will appear presently would not permit the approval of lump sum charters, save in the exceptional cases to which we have adverted and the conditions of which the "Bayard" could not satisfy.

> "Q. So there is nothing from your records here to indicate whether the Shipping Board was or was not requiring approval of lump sum charters as of November 3rd, is there? A. No, there is nothing there.
>
> Q. Do you, as a matter of fact, know whether or not approval would have been required for a lump sum charter early in November? A. No, I do not know.
>
> Q. I mean from your experience? A. No, I

had no occasion to find out, not from my knowledge.

Q. *Even this lump sum charter on the 'Erris' of October 13th is on an American vessel, not a neutral vessel, at all.* A. *Yes.*

Q. So the situation might be utterly different. A. Yes. I gave all the charters we had in our books" (Ap. pp. 34-35).

THE CASE OF THE "ARABIEN".

The American Asiatic Company of San Francisco telegraphed the Chartering Committee December 5th, 1917, as follows:

"1917 Dec. 5 AM 12 17

San Francisco Calif 4
Chartering Committee
United States Shipping Board
New York City N Y
Your telegram first instant relative chartering Arabien have offered hundred seventy thousand dollars lump sum this steamer one way Seattle to Japanese ports January sailing * * *.

American Asiatic Company Inc."

(Ap. p. 195.)

The Chartering Committee telegraphed in reply:

"December 5, 1917.

Collect.
Day letter.
American Asiatic Company,
San Francisco, Cal.
Replying your telegram Arabien Committee cannot approve proposed sum hundred seventy thousand dollars but will approve hundred thirty thousand dollars Seattle to Japanese ports one Japanese steamer fixed yesterday this basis * * *.
WR/O Chartering Committee."

(Ap. p. 196.)

Thus the Chartering Committee declined to approve a charter of the "Arabien" at $170,000.00 but expressed its willingness to approve a charter at $130,000.00. This, counsel for libelant says, indicates that the Chartering Committee in practice approved lump sum charters and would have approved the Moore charter on the "Bayard" at $400,000.00 (Brief p. 29). That we think does not follow. Counsel is silent on the action of the Committee in cutting the proposed charter hire from $170,000.00 to $130,000.00. This goes to the very heart of the issue. At $170,000, lump sum, the charter hire would be in excess of the basic 45 shilling rate; at $130,000, lump sum, it would conform thereto. It will be remembered as we have frequently suggested that the Committee, while preferring time charters at the 45 shilling rate and ordinarily disapproving lump sum charters, would in rare instances approve the latter if they conformed to the basic rate which for all practical purposes was the yard stick of measurement. Thus Mr. Smull said:

> "Q. One of your first determinations was fixing approximately what you considered a fair rate on these Pacific vessels of 45 shillings per ton deadweight on time charter? A. Yes.
>
> Q. Was it part of your policy therefore not to favor charters which worked out at higher figures, or berthings that worked out higher figures? A. Yes, anything that we thought would control the situation we adopted that plan.
>
> Q. This offer that has been testified to of $400,000 for a round trip would of course have worked out a much larger figure than your 45 shilling time charter. A. I haven't figured it but offhand I would think it would, considerably.

Q. It would have been figured if you had had an application for approval? A. Yes.

Q. Whether approval had been sought and would have been granted would have depended on how the rate worked out as compared with your 45 shilling time charter? A. Yes, sir.

Q. Which was your maximum figure at that time? A. Yes'' (Ap. pp. 229-230).

And Mr. Smull further testified in this connection:

By Mr. Frank:

''Q. There is a difference in your mind between a gross charter and lump sum charter? A. Well, it all depends on what form of charter, you can have a gross lump sum or you can have a time charter lump sum; a gross form of time charter and a gross form on rates is the same; your gross form is the number of tons multiplied by what you are allowed on the gross charter.

Q. Whether or not that would be approved depends, as I understand you in reply to Mr. Kirlin, upon the provisions of the charter party itself outside of the fact that it is lump sum? A. Yes, sir.

By Mr Kirlin:

Q. *Particularly as to how high the lump sum is, how it worked out as compared with your 45 shillings?* A. *Yes''* (Ap. pp. 236-237).

As stated above, the ''Arabien'' at $130,000 lump sum for a voyage Seattle to Japanese ports would be earning just what she would earn under time charter at the basic forty-five shillings per deadweight ton per month. This the following calculations show:

The deadweight tonnage of the '''Arabien'', according to Lloyd's Register of Ships, in its various annual editions, is 9440. She would earn per month, therefore, at the forty-five shilling rate 424,800 shillings (her

tonnage of 9440 multiplied by forty-five shillings). This reduced into pounds sterling at twenty shillings per pound would give 21,240 pounds as her monthly earnings. The pounds sterling expressed in dollars at $4.86 to the pound would give $103,226.40 as the vessel's monthly earnings in dollars at the forty-five shilling rate. The last figure divided by 30 would give $3440.88 as her earnings per day at the basic rate.

The speed of merchant vessels having a capacity of twelve knots and above is listed in the appendix to the 1919-1920 edition of Lloyd's Register of Ships at p. 983. From the fact that the "Arabien's" speed is not listed, it follows that her speed does not equal twelve knots. As a matter of fact, we know by inquiry that her speed is about nine knots, but as this is not in the record we make our computations on the basis of Lloyd's Register, of which the court may take judicial notice. Her highest possible speed, seeing that her speed is not listed in Lloyd's, is eleven knots and in these calculations we use that figure, though it would obviously be to our advantage to have the speed lower, inasmuch as the faster the vessel the greater would be her earnings per day under the $130,000 charter and we are here showing that the Shipping Board would not allow her to earn more than the basic rate The distance from Port Townsend, near Seattle, to Yokohama is, according to Gram's Atlas of the World, page 6, 4202 miles, which reduced to knots is 3636.15 knots. At eleven knots per hour the vessel would consummate this voyage in 330.56 hours (3636.15 knots divided by 11 knots), or, dividing by

24, 13.77 days, or in round numbers 14 days. To this we add, fifteen days, as a fair allowance for loading and discharging, and eight days for additional ports, (seeing that the proffered charter was from Seattle to Japanese *ports*) plus one day for loss on the calendar, or an approximate total of 38 days, which would be consumed in performing the charter proposed in the telegram. The Chartering Committee of course had at hand all the data we have, and more, for such calculations.

As shown above, the earnings per day of the "Arabien" at the basic forty-five shilling rate would be $3440.88. Multiplying this by 38 we get $130,753.24 as the hire which the "Arabien" would earn at the basic forty-five shilling rate under the charter proposed in the telegram.

It is, therefore, apparent that the reason the Shipping Board declined to approve the proposed charter at a lump sum of $170,000.00 but expressed its willingness to approve it at $130,000 is that the latter transposed into terms of tonnage and time would work out at the basic rate.*

On the contrary, the "Bayard" at a lump sum charter of $400,000 would earn well more than twice the basic rate (see p. 59, infra).

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*Before leaving this matter we wish to point out that counsel for libelant at page 29 of his brief has misunderstood Mr. Smull's testimony in part with reference to the "Arabien". Mr. Smull stated (Ap. p. 247) that the "Arabien," before she was fixed to the Shipping Board, was loaded in the Far East on berth for her owners' account without any charter to cover the transaction. Counsel for libelant has confused this voyage with the one offered by the American Asiatic Company in their telegram of December 5th.

THE CASE OF THE "TRANSVAAL".

Counsel points to the "Transvaal" as chartered on a lump sum basis on March 18, 1918. (Brief pp. 26-27.) This was four months after the period here under inquiry. The "Bayard's" detention was November 3rd to December 21st, 1917. The material inquiry throughout the case was whether a lump sum charter carrying rates higher than the basic 45 shilling rate would have been approved *at that time*. On that period and on that period alone, was Mr. Smull examined. To it counsel for libelant as well as ourselves, limited the questions in terms. Mr. Frank's request was:

> "I want access to the records of the Chartering Committee to ascertain what the records show with respect to the chartering of vessels *during this period from November 3 to December 21*" (Ap. p. 226).

The Committee (Mr. Smull not voting—Ap. p. 246), voted that it could not show Mr. Frank these records. But Mr. Smull testified that *during this period* (and he was not examined and counsel for libelant did not ask to examine him on any other), there were no approvals of lump sum charters, save only those for neutral vessels which the Chartering Committee wanted to get into this country and within its control. Mr. Smull, under cross-examination by Mr. Frank, testified:

> "Q. Since then I understand you have also made examination and found no cases of disapproval of any such charters? A. Yes, sir, between, *as you requested*, the dates of November 3d and December 21st.
>
> Q. Didn't you make an examination to cover the same time to which you testified in this case? A. Yes, that is the time I believe.

Q. The time you testified to here was the time you entered upon the duties in the Chartering Committee—'From the time I went in there no approval of steamers on round trip steamers up to the first of the year'? A. Yes, that is all right.

Q. 'Yes, I went through our list of approvals up to about the 1st of the year and from the time I went in there are no approvals of steamers under foreign flag, round trip charters.' A. Round trip charters; we use the words 'round trip charters' to mean time charter round trip, and the record of that answer seems to be a little confused because I did not mean no record of round trip time charters: there was no record of charters for round trip on the gross form of charter.

Q. Is there any record of any lump sum charters during the entire time mentioned, either of approval or disapproval? A. Not for round trip, no.

Q. Am I to infer from that that there may be some others in the record for approval or disapproval of lump sum charters for a single trip either way? A. Yes, there were.

Q. That is the few that you referred to as being homeward? A. Homeward, yes.

Q. Homeward bound? A. Yes, sir.

Q. Otherwise there is nothing in the record? A. Nothing else.

Q. That covers the entire proposition without any distinction at all; you are making a distinction of round trip that covers the whole thing? A. Gross form.

Q. Lump sum charters? A. On lump sum charters'' (Ap. pp. 239-241). (Italics ours.)

Our inquiry on direct examination also covered this period only:

"Q. Did you say you had examined your records before you came to see whether you had approved any lump sum charters the end of October or early November? A. Yes, I went through our list of approvals up to about the first of the year,

and from the time I went in there are no approvals of steamers under foreign flag round trip charters.

Q. Lump sum? A. Lump sum gross form. The only approval was several of these boats in the East we had to get this way and we allowed a lump gross charter to get them here.

Q. After you got the Kina, Peru and Arabien here did you approve any lump sum charters on them? A. No, they are all chartered to the United States Shipping Board now.

Q. All on time charters? A. Yes'' (Ap. pp. 216-217).

And the court itself in overruling Mr. Frank's objection to the taking of Mr. Smull's testimony and in consenting that it be taken, asked that the testimony cover the period of the ''Bayard's'' detention.

> ''The Court. I would prefer that your proof should include both as to whether they had approved *during this period* time charters—as to whether they had not approved or had refused to approve them covering all cases *during that period* in regard to charters of this kind'' (Ap. p. 125).

Thus counsel for libelant, counsel for claimant and the court understood that the inquiry was to be directed to the period November 3rd to December 21st, 1917.*

Mr. Smull's testimony *on this period* was taken in New York on September 30th and on October 18, 1918.

Two months afterward counsel for libelant offered in evidence the ''Transvaal'' charter party of March 23, 1918. We admitted its execution and that the vessel

*Our offer was in broader terms (Ap. p. 125) but the understanding was that the inquiry should be, and it correctly was, for the *material* period, namely, November 3, to December 21, 1917.

sailed under it but objected to its relevancy and materiality and have insisted throughout on that objection as well taken. Mr. Smull's deposition was two months over. A lump sum charter party approved in March, 1918, would be immaterial to prove that a lump sum charter party would have been approved between November 3rd and December 21, 1917. No lump sum charter party was approved during that period and the evidence is that none would have been. We quote from the transcript of December 18, 1918, containing the objections:

> "Mr. Frank. Your Honor will remember that this case was tried up to a point where Mr. Griffiths wished to take some depositions in the East. He took those depositions. I don't know about his introducing them. In the meantime there are some little matters that I wish to present to the court.
>
> I have here a charter party under date of the 22nd day of March, 1918, of the Danish steamer 'Transvaal', which Mr. Griffiths is prepared to admit was made and executed and approved by the chartering committee of the board and interallied chartering executive committee of London.
>
> Mr. Griffiths. The chartering committee. Was it approved, as a matter of fact, by the interallied chartering executive committee?
>
> Mr. Frank. Well, as a matter of fact, the voyage was preformed under the charter party.
>
> Mr. Griffiths. Yes, I know that.
>
> Mr. Frank. We ask that that be admitted in evidence; we will call it Libelant's Exhibit A as of this date.
>
> Mr. Griffiths. By the way, Mr. Frank, with regard to the offer of that charter party, dated March 22, 1918, I consent to that, that is, I stipulate that the charter party was executed and that it was approved by the chartering committee of the Shipping Board, and that the vessel sailed under that

charter; that is, I do not question the charter party, and that that is a true copy. *My stipulation does not go to any consent to its materiality. I claim that it is away beyond the period examined into in this case, and in the depositions taken in New York.*

Mr. FRANK. *I understand that.*

Mr. GRIFFITHS. *What I mean was that I know the charter was executed, but I claim that it is immaterial and irrelevant and was offered too late and we could not examine our witnesses in the East upon it.*

Mr. FRANK. That was an entirely different proposition. It was offered just as quickly as I got it. I showed it to you just as quickly as I got it. I surely did not hold it out.

Mr. GRIFFITHS. I don't question that at all.

Mr. FRANK. And if those fellows had allowed me to examine their record I would have had it right there.

Mr. GRIFFITHS. I understand that in the East they asked you if you wanted any further examination of Mr. Smull beyond the end of December; this examination covered up to the end of December.

Mr. FRANK. *I asked them for a full examination of all of their records and they declined to let me have them; then it was limited to January 1st, and even that was declined.*

Mr. GRIFFITHS. *Well, the record will show what the situation is in that regard''* (Ap. pp. 252-254).

The record shows, as we have pointed out, that Mr. Frank's inquiry was limited explicitly to the period November 3rd to December 21st, 1917. Mr. Frank on cross-examination of Mr. Smull, said:

> "Q. So you can have it accurate, I want to have an opportunity to go over the records myself? A. You want to know whether I can show you the exchange letters on the subject of "Bayard"-"Beaver"?

Q. Yes? A. What else?

Q. *I want access to the records of the Chartering Committee to ascertain what the records show with respect to the chartering of vessels during this period from November 3 to December 21?* A. You mean as to approvals and disapprovals?

Q. Yes, as it appertains to the facts we have been examining about in this case? (Ap. pp. 226-227)

Access to the records, as we have said, could not be given him, but Mr. Smull examined the records *for the very period requested by counsel and there was no suggestion that he go into the year 1918.* To bring in a charter party dated months after the period under investigation and at a time when, even if material, there could be no cross-examination of the Chartering Committee on it, is patently subject to the objection we took. The District Court in effect sustained the objection and rightly, we think, gave no consideration to the "Transvaal" charter party.

We have shown first, that for the period in question, the basic rate was 45 shillings per deadweight ton per month, time charter, and that this rate constituted a fixed rule of the Committee subject to no variance and insisted upon for all charters; secondly, that the Chartering Committee normally disapproved lump sum charters; thirdly, that the only cases in which the Committee approved lump sum charters for neutral vessels were those, (a), where the vessel being in a foreign port beyond the Committee's control, it had to approve in order to get her into an American port and there subject to the control of the Committee and (b), where

taking into account the tonnage of the vessel and the length of the proposed voyage, the lump sum rate really equalled only the basic rate of 45 shillings per deadweight ton per month. We now propose to show, that—

Fourth. The proposed $400,000 lump sum Moore charter was for a voyage outward from San Francisco, the vessel being in this port, and amounted to more than twice the basic rate and could not possibly have been approved.

The "Bayard" at the time under consideration was lying in the harbor of San Francisco. The motive that led the Chartering Committee to approve lump sum charters on three Danish vessels in the Orient (and these were the only lump sum charters that were approved during the period in question), viz.: to get them into the United States and within the control of the Shipping Board, would not therefore apply to the "Bayard".

Nor can it be said that the proposed lump sum charter on the "Bayard" would have been approved upon the theory that, though lump sum in form, its figure of hire reduced into terms of tonnage and time would not exceed the prescribed 45 shilling basic rate. It would exceed the basic rate as the following calculations show.

Under the Moore lump sum charter the vessel would net the owners, taking the figures of counsel for libelant, $4215.56 per day (Brief p. 45).

At the Shipping Board's prescribed basic rate of 45 shillings per deadweight ton per month, the vessel would net the owners $1635.40 per day. This is calculated as follows:

The "Bayard" was 5200 tons deadweight (Ap. pp. 21, 43, 197). Multiplying this figure by 45 shillings we get an earning for a month of 234,000 shillings. This reduced into pounds sterling (20 shillings to the pound) gives 11,700 pounds sterling per month. Pounds sterling reduced into dollars at $4.86 to the pound gives $56,862 per month. Divided by 30 this gives as the gross earnings per day $1895.40. Under time charter the charterer pays the general expenses (Ap. pp. 114, 115), but the owner pays the wages, provisions, stores and engine stores (Ap. p. 236) which for the "Bayard" were $260.00 per day (Ap. p. 43 and Libelant's Brief, p. 44). We accordingly, deduct $260.00 from the gross earnings of $1895.40 and get $1635.40 per day as the net sum to which the "Bayard's" owners would be entitled at the basic rate of 45 shillings per deadweight ton per month.

Summarizing, then, under the Moore lump sum charter, the owners would net $4215.56 per day; whereas at the basic rate they were entitled only to $1635.40 per day. It cannot, therefore, be contended that the Moore charter might have been approved because, though lump sum in form, its rate of yield was substantially in accord with the basic 45 shilling rate. It was much more than double. And, as we have seen, while by rare exception to the normal rule, charters not of the time form were sometimes approved, the basic rate was insisted upon uniformly, and the consideration of charters individually was never concerned with rates *except to insist that the basic rate be absolutely observed* (Ap. p. 230 and see p. 36, of this Brief).

Thus, so far from libelant's having sustained its burden of proof to show that the Moore lump sum charter would have been *approved,* the evidence is positively that it would have been *dis*approved: time charters were preferred and normally required; lump sum charters were disapproved except to get neutral vessels into the United States and in rare cases where the lump sum rate resolved into terms of tonnage and time did not in fact exceed the basic 45 shilling rate. The "Bayard" comes under neither of the last named categories.

The actual negotiations concerning the "Bayard" and the "Brazil" (which was under the same managing ownership) prove, we respectfully suggest, the soundness of the foregoing conclusions and to these negotiations we now accordingly ask the court's attention:

(c) *The negotiations concerning the "Bayard" and "Brazil".*

These show, we think, that the Chartering Committee would not approve charters unless they were in time form at the forty-five shilling rate, or, in exceptional cases, in lump sum form which would work out at that basic rate. With specific reference to the "Bayard" and "Brazil", the negotiations show immediate approval by the Committee of proffers of time charters at the forty-five shilling rate and the futility of efforts to get the Board to consider lump sum charters in excess of the basic rate, and, incidentally, of proposed berthing for owners' account.

With this by way of preface, we proceed to a review of the negotiations. They open with the telegram dated

December 5, 1917, from the American Asiatic Company of San Francisco to the Chartering Committee, reading as follows:

"1917 Dec. 5, AM 12 17.

San Francisco Calif. 4
Chartering Committee United States Shipping Board,
New York City NY
Your telegram first instant relative chartering Arabien have offered hundred seventy thousand dollars lump sum this steamer one way Seattle to Japan ports January sailing also have bid two hundred seventy thousand dollars motorship Bayard one Pacific round San Francisco to Japan and return San Francisco or Atlantic Coast must have two steamers to clear our congestion freight this port and we were advised that owners these steamers will not charter on Government form time basis but will place same on berth themselves for other ports if you can't approve our bids can you not help us arrive at some agreement with the owners in order that we will not lose the steamers and further congest this port.

American Asiatic Co. Inc."

(Ap. p. 195.)

The Committee replied the same day:

"December 5, 1917.

Collect
Day Letter
American Asiatic Company,
San Francisco, Cal.
Replying your telegram Arabien committee cannot approve proposed sum hundred seventy thousand dollars but will approve hundred thirty thousand dollars Seattle to Japan ports one Japanese steamer fixed yesterday this basis *telegraph total dead-*

weight carrying capacity motorship Bayard.
WR/O Chartering Committee."*
(Ap. p. 196.)

To the last quoted telegram the American Asiatic Company replied the same day that the total deadweight capacity of the "Bayard" was 5300 tons (it was in fact 5200, Ap. pp. 21, 43, 197) and the bale capacity 393,419 cubic feet (Ap. p. 197). The Committee telegraphed back on Dec. 6th, disapproving the proposed lump sum charter (Ap. p. 197). The very next day G. W. McNear, Inc., telegraphed the Chartering Committee for approval of proposed time charters on the "Bayard" and "Brazil" at forty-five shillings per deadweight ton per month (Ap. p. 198). The Committee immediately approved (Ap. p. 199).

Thus, we have within the space of two days a proposed *lump* sum charter on these vessels for a trans-Pacific voyage *disapproved* and a proposed *time* charter at the forty-five shilling rate forthwith *approved.* We also find in the first exchange of telegrams a disapproval of a lump sum charter on the "Arabien" for$170,-000.00, but an indication that a lump sum charter on her for $130,000.00 would be approved.

Bearing in mind the point to which we have so frequently asked attention, namely, the absolute insistence of the Board on its basic forty-five shilling rate as the maximum, whether that rate appeared directly expressed in time charter terms or was, in fact, the rate on such lump sum charters as were approved, these exchanges

*The part of these telegrams referring to the "Arabien" has already been discussed (pp. 47-51, supra).

of telegrams are most significant and, we urge, uphold our contentions in this controversy.

Counsel for libelant (Brief, p. 29), note with satisfaction that while the "Arabien" was disapproved at $170,000.00 she was approved at $130,000.00 lump sum. But we think they miss the significant point, namely, that the reason the Committee insisted upon the reduction was to bring the rate into conformity with the basic forty-five shilling rate; as shown on page 51, supra, of this brief, the lump sum of the charter of the "Arabien" at $130,000.00 would so conform. The case of the "Arabien" thus supports our thesis that the only lump sum charters which the Committee would approve were those which were not in excess of the basic rate.

Similarly, counsel note with satisfaction that the Committee, when asked by the American Asiatic Company to approve a lump sum charter on the "Bayard" for $270,000.00, instead of declining flatly, asked for the "Bayard's" deadweight tonnage (Brief p. 29). Here, again, with all respect we believe counsel miss the point. Obviously, the Committee, being informed by the telegram of the contemplated voyage, needed only the tonnage in order to calculate whether the figure of $270,000.00 would be in excess of the basic forty-five shilling rate. Being furnished the tonnage, they immediately telegraphed that the proposed lump sum charter would not be approved. And why? Manifestly, because the hire was something over $1000.00 per day in excess of the basic rate. The voyage proposed was "One Pacific round San Fran-

cisco to Japan and return, San Francisco or Atlantic Coast''. The voyage for which the Moore charter was intended was from San Francisco to ports in the Philippines and return. The Philippines are further than Japan, but the American Asiatic charter allowed an option of return to an Atlantic port. It is obvious that the margin of difference between the time and expense of the two voyages was little or nothing.

The expense of such a voyage libelant gives at page 45 of its brief as $41,677.00. Deducting this sum from the proposed hire of $270,000.00 we have as the net earning of the ''Bayard'' for this proposed charter to the American Asiatic Company $228,323.00 which divided by 85 (the approximate number of days that would be employed in earning the hire, Brief, p. 45), gives $2686 as the net earning per day under this charter had it been approved. We have shown at page 59, supra, of this brief, that the net earning of the ''Bayard'' at the basic maximum rate approved by the Committee of 45 shillings per deadweight ton per month would be $1635.40. Therefore, the American Asiatic Company were proposing a lump sum charter more than $1000 in excess of the basic rate, and this the Committee disapproved.

Can it be seriously contended that the Chartering Committee would have approved the Moore charter which was twenty-six hundred dollars in excess of the basic rate, when it disapproved the American Asiatic charter which was a thousand dollars in excess of the basic rate?

Counsel for libelant rely (see Brief pp. 19-23) on Mr. Smull's testimony to the effect that charters were

individually examined and considered and that it could not be stated in advance whether a particular charter would or would not be approved, (Ap. pp. 103, 219) *but overlook Mr. Smull's testimony that the debate and consideration of individual charters never went to the question of rates except where a change in the basic rate was under discussion—the basic rate once fixed was absolute for all charters coming before the Committee and no charter, whatever its form, would be approved if in excess of this basic rate, and a charter, even if conforming so far as the actual recital of rates was concerned to the basic rate, would not be approved if there were other clauses which in reality brought the rate above the basic rate.*

> "Q. You have spoken of disagreements amongst the members about time charters, did those relate to the allowance of higher charters which amounted to higher rates as they worked out more than 45 shillings on the Pacific? A. No, no differences in rates, what different clauses would give the charterer more of a concession, or owner more of a concession, but the rates were agreed upon; we have never had a discussion over rates until there came to be a general discussion, when it looked as if the rate should be lowered or raised, but when the rate was once decided on that was the basic rate; but a charter party would come in, several charter parties have come in with the same rate but they will have all sorts of clauses rung in that affect the rates, affect the conditions, that is where there would be arguments pro and con as to whether those clauses should be allowed to stay in.
>
> Q. Whether the particular clauses amounted to an increase in rates? A. Yes, you would be surprised to find out how many things were rung in" (Ap. pp. 230-231).

To continue with the negotiations on the "Bayard" and "Brazil". As we have stated, the Chartering Committee immediately approved the McNear offer of a charter of 45 shillings per deadweight ton per month, subject only to the proviso that the Shipping Board must have priority on homeward business (Ap. p. 119). The significance of this proviso is that one of the chief objects of the Committee was to insure the carriage during these war times of the most essential commodities (Ap. p. 192); and also that the Chartering Committee was working in co-operation with the so-called Interallied Chartering Committee in London. There was apparently an agreement between England on the one hand and Denmark, Norway and other neutral countries on the other that they would not permit charters of their vessels unless the voyages were approved by the Interallied Chartering Committee. This Committee had been actively in operation long before the "Beaver"-"Bayard" collision, and the necessity of submitting neutral charters to it for approval was experienced by the United States Chartering Committee every day in the conduct of its business (Ap. p. 209). The approval of the McNear charter by the American Chartering Committee, therefore, did not end the matter. This is at once evident from McNear's next telegram (Dec. 15th) in which he states that cables have been sent for the approval of the Interallied Chartering Committee upon a return cargo of wool from New Zealand, and requests the United States Chartering Committee's approval of this homeward cargo (Ap. p. 200). To this, the Chartering Committee at New York assented (Ap. p. 201) and

McNear accepted the wool cargo tentatively while awaiting the approval from London (Ap. p. 201). Later, (Dec. 16th) McNear telegraphed the Chartering Committee in New York that he had received a wire from London disapproving the charter of the "Brazil", and asked the United States Chartering Committee to take up the matter with the Interallied Committee (Ap. pp. 211-212). Meanwhile, no word had come from Olsen & Company accepting the McNear charter of the "Bayard" and "Brazil". On December 18th, McNear telegraphed that the San Francisco agents had received word from Olsen & Company that, *subject to the approval of the Shipping Board,* the owners had arranged for a cargo of wheat and flour from Australia. McNear then begs the Shipping Board to exert its power and to insist on wool as a part of the cargo of the "Bayard" and suggests a compromise, namely, that the "Bayard" bring wool and the "Brazil" bring wheat (Ap. pp. 202-203).

Three days later, December 21, McNear telegraphed again his fear that the Interallied Committee would not yield and asked the Chartering Committee to authorize him to send a telegram to the owners of the "Bayard" that the Shipping Board approved berthing the vessels to New Zealand and Australia,* would maintain its

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*This meant berthing not for owners' account but by McNear, the charterer, as shown by the last portion of McNear's wire, "Please wire at once, if we may send this cable *and proceed booking cargo outward*" (Ap. p. 204). Counsel for libelant must be mistaken (Libelant's Brief, p. 32) in taking this telegram and the Shipping Board's reply to it as an approval of berthing for owners' account. This we confidently think is shown at pages 71-74, infra, where these telegrams are fully considered in connection with discussion of the Committee's attitude toward berthing neutral vessels for owners' account.

right to indicate the return cargo and would undertake to arrange accordingly with the Interallied Committee (Ap. p. 204). The Chartering Committee immediately authorized this telegram, but reminded McNear that the outward cargo space must be divided among the several interests at San Francisco, and not given to any one interest. It also advised that the cargo be not booked until the approval came from the Interallied and the owners (Ap. p. 205). Later, on the same day (Dec. 21), the Chartering Committee telegraphed that it preferred the Pacific Coast voyage but was still awaiting word from London (Ap. p. 206). McNear answered that equal apportionment and equal rates would be given on regular shipments to New Zealand, and stated that he had the owners' approval for these voyages and also the Interallied's sanction, providing that the homeward cargo was wheat and flour for the East Atlantic coast (Ap. p. 207).

McNear was mistaken about the owners' approval, however, for on December 24th he wired that the London agents of the "Bayard" and "Brazil" had cabled that the owners had signed with the English wheat executives for return cargoes of wheat and flour to the East Atlantic coast (Ap. pp. 207-208).

The telegram from McNear three days later (Dec. 27), referring to the previous telegram, explains how the whole misunderstanding arose, namely, that the McNear offer to the owners of time charters crossed the London agent's cable advising that a cargo of wheat had been already accepted from Australia to the East Atlantic coast by the owners, and instructing the

San Francisco agent to berth the vessel for New Zealand, *subject, of course, to the approval of the Shipping Board* (Ap. pp. 214-215). McNear then referred to the Shipping Board's disapproval of berthing vessels for owners' account, and suggested that the owners be notified that the time charter was still open and that the Shipping Board disapproved berthing the ships for owners' account (Ap. pp. 214-215).

Negotiations were closed with a telegram from McNear on January 4th, stating that the Interallied Committee had agreed that both vessels should return to the Pacific Coast with cargoes of wool *and that the owners had accepted the time charter* (Ap. p. 215). To this the Shipping Board replied that approvals upon the outward cargo should come from the Cook Shipping Board, that is, the local Board at San Francisco.

We have reviewed these exchanges of telegrams as showing significantly, first, a disapproval of a proposed lump sum charter on the "Bayard" when her given tonnage revealed that the lump sum was more than $1000 in excess of the basic rate; secondly, that the Committee refused a lump sum charter on the "Arabien" which would have been in excess of the basic rate, but said it would approve one in conformity thereto; thirdly, that the McNear proposal of charters on the "Bayard" and "Brazil" at 45 shillings per deadweight ton per month, time form, was immediately approved; fourthly, that an attempt of the owners to have the vessels berthed for their own account was unsuccessful; and, finally, that the vessels sailed under time charter at the basic 45 shilling rate.

The telegrams are interlinked. Counsel for libelant on pages 30-33 of their brief, attempt to construe them separately as relating to several different offers to which various replies were made by the owners. That was not the situation. Such a view must assume that reply cablegrams came from the owners in Norway in an impossible interval of time. Mr. Kutter testified on the trial that it took approximately two weeks to get a reply cable from Norway (Ap. p. 117), whereas libelant would have answers coming from the owners at three day intervals (see particularly pp. 30-32 of Libelant's Brief).

Counsel also, as we have previously pointed out, erroneously interpret the exchange of telegrams of December 21st between McNear and the Chartering Committee as approval by the latter of berthing for owners' account. This follows, as we shall indicate under our next heading, from counsel's consideration of these telegrams in isolation instead of in their interlinking connection with the whole series of telegrams. Read in context they obviously do not contemplate a departure from the previously submitted time charter but were intended to straighten out the controversy between McNear and the Shipping Board on the one hand and the Interallied Committee on the other as to whether the vessels should take wool or wheat from Australia and New Zealand to this country. The berthing, as clearly appears in the discussion, immediately ensuing, was a berthing for *charterer's*, not *owners'*, account. The telegram of December 27th (Ap. p. 214), interpreting further the telegram of December 21st

(Ap. p. 204), shows this to be the situation and that McNear clearly understood that never at any time would the Board approve berthing the vessel for owners' account, and that he could not have meant that in his telegram of December 21st.

(d) *Berthing for owners' account.*

Libelant rests its claim for damages for demurrage upon the Moore charter. Since, however, it refers to berthing of the vessel for owners' account also, though it makes no claim for damages based thereon, we presume its thought is that a showing that the Shipping Board would have approved berthing for owners' account will tend to sustain its contention that the Moore charter, yielding less money, would similarly have been approved; but libelant has not proved that the Shipping Board would have countenanced a berthing of the vessel for owners' account, and, apart from the burden of proof, the evidence is to the contrary.

The Committee's control extended not only to charters but to voyages where no charter party existed. Mr. Smull testified:

> "Q. When was it that you began to interfere with the placing of vessels on the berth for the account of the owner? A. Almost immediately.
>
> Q. I understand, Mr. Smull, that in October and November no vessels were permitted to be placed on the berth for account of the owner? A. I would not say that absolutely, I would not say that offhand; it is a big question; that was the idea.
>
> Q. You have not looked into it, you have no recollection about it, is that the situation? A. I have a recollection of Norwegian boats on the Paci-

fic, we did not want the owners to berth or charter on gross form of charter, for almost immediately we reduced the time charter rates, we were trying to get the owners to come into time charter conditions to reputable firms.

Q. You were feeling your way, you didn't feel you had control of the situation? A. No, we had control right away of boats that were in this country, we didn't have it when they were up in Canada, up in Vancouver, which was rather a sore point.

Q. You would not undertake now to say that such vessels were not placed in berth during the period here in question? A. To the best of my recollection there were no boats on berth on account of owners.

Q. Your recollection, I believe you have no record in mind or no memory about it? A. I do not recollect any boat that was on the berth after the 1st of November, Norwegian boat after the 1st of November. .

Q. What period are you speaking of—I mean around the 3rd of November? A. I would not say the exact date, I would say about the 1st.

Q. You mean the first part of November, not the first day? A. Yes.

Q. It might include the 3rd of November? A. Yes.

Q. Probably a week or two after? A. I don't know, about the first of November is about all I can say; it might have been in October, because we tried to do that right away" (Ap. pp. 220-221).

Bearing in mind that it was a primary object of the Shipping Board to control the selection of commodities to be shipped and to ensure the prosecution of voyages for essential purposes and the retention in those anxious war times of as many neutral ships as possible in the trade of the United States, and consequently to get as many neutral vessels as possible

under charter to "reputable American firms", to use Mr. Smull's phrase, it is obvious that berthing of neutral vessels for owners' account could not meet the approval of the Committee. *It would deprive the Committee and the Government of any control over the commodities to be shipped inward to the United States and would make it impossible for the Committee to ensure, once a neutral vessel had sailed from an American port, that she would return here and remain in our trade.*

In the negotiations that resulted finally in the time charter of the "Bayard" to G. W. McNear, Inc., it will be remembered that the Chartering Committee approved this charter immediately but that the telegram to the European owners containing this McNear time charter crossed a telegram from the owners to their San Francisco agent, advising the latter that the owners had arranged for a homeward cargo of wheat on the "Bayard" and "Brazil" from Australia, and instructing the agent that these vessels should be berthed outward from San Francisco for owners' account. With both the time charter and the proposal for berthing for owners' account before it, the Chartering Committee selected the former, obviously because the latter would, once the vessel had left San Francisco, have placed her beyond the control of the government of the United States perhaps for the entire period of the war.

Counsel for libelant interpret the exchange of telegrams of December 21st between McNear and the Chartering Committee as showing that the latter were ready

to approve a berthing for owner's account (Brief p. 32). We think this a misinterpretation of these telegrams, both in and of themselves, and in their relation to the series of telegrams which made up these negotiations. Before pointing out this error in detail, we beg for clearness' sake, to quote the telegrams. The first was from McNear to the Chartering Committee and read:

"San Fran Dec. 21, 17.

Chartering Committee,
U. S. Shipping Board, Custom House, N. Y.

Regarding motorships Bayard Brazil unless you bring strong pressure to bear on Interallied fear they won't let go in any event there will be further delay in view of all the circumstances please authorize us to send following cable to owners quote Bayard Shipping Board have approved berthing vessel New Zealand and Australia but maintaining privilege indicating priority return cargo destination American Pacific or Atlantic port undertaking to arrange accordingly with Interallied Committee unquote *please wire at once if we may send this cable and proceed booking cargo outward which you will understand takes time to get forward.*

3 26P G. W. McNear."

(Ap. p. 204.)

The Chartering Committee replied:

"December 21, 1917.

Collect
Day Letter
G. W. McNear, Inc.,
San Francisco, Cal.

Bayard Brazil Washington authorizes us to wire you to go ahead on these vessels as per your telegram but Carry asked us to remind you that his understanding on the outward business cargo to be booked subject his confirmation in other words

cargo space will be divided among the several interest at your loading port and not given to any one party if you get confirmation from owners we will endeavor to get Interallied to agree to the voyages of both vessels stop on homeward voyages we must have priority as per your telegram *would not advise booking cargo until you get confirmation from owners and Interallied sanction.*

JBS/O Chartering Committee."

(Ap. p. 205.)

Now, obviously, McNear and the Committee had in mind not a berthing of the vessel *for owners' account* but a berthing of the vessel *by McNear* after receiving a time charter from the owners, for which he had previously secured the Committee's approval (Ap. p. 198). In giving its approval the Chartering Committee prescribed simply that "Shipping Board, Washington, must have priority on homeward business" (Ap. p. 199). This led to difficulties because McNear and the Shipping Board wanted to bring back wool, whereas the Interallied Committee and the owners wanted to bring back wheat or flour. It was in the effort to straighten out this difficulty as to the homeward cargo that McNear's telegram of December 21st was sent to the Chartering Committee (Ap. p. 204). That McNear intended to book the cargo himself is shown by the phrases we have italicized above in his wire and in the Committee's reply. In his telegram McNear asked whether he might proceed booking cargo, and the Committee in its reply suggested that it would not advise his booking cargo until confirmation came from the owners and the Interallied Committee. McNear, apart altogether from the wording of the telegrams,

certainly would not be booking cargo for the owners' account because the owners had their own agent in San Francisco, the Norway Pacific Line. McNear throughout was seeking a charter. Finally McNear's telegram of December 27th to the Shipping Board shows clearly that he understood all along that the Board would not approve a berthing for owners' account. His telegram of December 27th reads:

"San Francisco, Dec. 27, 17.

Chartering Committee,
U. S. Shipping Board, Custom House,
New York.

Bayard Brazil replying your wire twenty first sorry if there has been any misunderstanding stop agents of owners cabled firm offer our account forty-five shillings time charter terms delivery here redelivery here in meantime agents here received cable from London agents of owners advising acceptance full cargoes wheat and flour for these vessels from Australia to East Atlantic Coast subject approvals Shipping Board and further instructing them to berth vessels for New Zealand and Australia stop we tried to make this position clear to you in our telegram twenty-first which please re-read in conjunction with your reply same date stop considering that you disapprove berthing vessels we should advise agents to cable owners renewing our offer time charter terms telling them Shipping Board disapprove berthing owners account please confirm at once stop regarding wool account Textile Alliance we felt we already had your approval see your letter December fifteenth but in view of Inter-allied insistence that vessels bring up wheat and flour we suggested that you get their sanction for the wool which we understand urgently needed for war purposes.

345P G. W. McNear."

(Ap. p. 214.)

It should be particularly noted that McNear here asks a rereading of his telegram of December 21st as showing that he was trying to adjust the difficulty as to whether the homeward cargo should be wheat and flour or wool but that he never intended by the telegram of December 21st to suggest a berthing for owners' account, because he knows "you disapprove berthing vessels".

To interpret these and other telegrams in the record correctly it is necessary that they be read in their interlinking relation with all the other telegrams, and not in isolation.

It has now been demonstrated, we venture to think, that libelant has not sustained its burden of proof to show with reasonable certainty that the Moore $400,000 charter on which it bases its claim for damages for demurrage would have been approved; and furthermore that, apart from burden of proof, the evidence is to the contrary. Nor has libelant shown with reasonable certainty, or indeed at all, that the berthing of the vessel for owners' account, referred to by counsel for libelant as a possibility but not relied upon as proof of damages, would have been approved and the evidence is that it would not have been. This brings us to the next point which is that—

4. The evidence shows that, not having approval of the Moore charter and not being permitted to berth the vessel for its own account, libelant would have allowed the "Bayard" to lie idle rather than sail her at rates which would have been approved. Consequently, libelant has not sustained its burden of proof to show that its vessel would have been employed but for the collision. Apart from burden of proof the evidence is that, regardless of the collision, the "Bayard" would have been idle during the period in question.

The idleness of the "Brazil".

The contention that the owners of the "Bayard" were injured by the loss of the vessel's time must be considered in conjunction with the situation in respect to the "Brazil" which was under the same managing ownership. This was a Norwegian motorship, twin screw, of the same general type as the "Bayard" and engaged in the same sort of trade.

The "Brazil" entered San Francisco Harbor on November 13, 1917 and remained idle there until the middle of January 1918 (Ap. pp. 118-120). She left about the same time as the "Bayard" which was January 17, 1918* (Ap. p. 120).

Thus, out of the seventy-five days during which the "Bayard" was in San Francisco harbor the "Brazil" was there about sixty-five days. A period of voluntary idleness on the part of the "Brazil" occurring almost simultaneously with the period during which the "Bayard" was laid up for repairs and because of which

*The exact day of the "Brazil's" departure does not appear in the record. Captain Larsen of the "Brazil" verified some of her War License papers from San Francisco on January 14, 1918 (Ap. pp. 96, 97, 98, 102) and her departure was, of course, subsequent to that date.

the owners claim that they were damaged so severely! In view of the facts of the case—the extraordinary condition of the shipping world, the great demand for vessels and the control of the Shipping Board—the idleness of the "Brazil" is peculiarly significant in determining whether the detention of the "Bayard" damaged her owners.

Mr. Kutter, of the Norwegian Pacific Line, testified that this line was the owners' agent for handling both the "Bayard" and the "Brazil" (Ap. p. 118). He admitted that Fred Olsen & Company of Christiania, Norway, were the *managing owners* of both the "Bayard" and the "Brazil".† That is the material factor as the cases cited hereafter show. During the whole time that the Norway Pacific Line managed these vessels on the Pacific Coast, all charters on both vessels were submitted to Olsen & Company, and it was the only party with whom the Norway Pacific corresponded.

> "Q. You said that you were agent also for the 'Brazil', how long have you been agent for her? A. We have been agent for the 'Brazil' since she has been operated out here, which was about October or November, 1916.
>
> Q. To whom have you been reporting back at that time on the 'Brazil'? A. How do you mean reporting back?
>
> Q. Who were her owners then? A. Our head office is Fred Olsen & Co., in Christiania, with whom we correspond.

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†And Lloyd's Registry of Ships in its various editions so records. Mr. Kutter said the "Brazil" was not in Lloyd's. He was mistaken. Both she and the "Bayard" are. The identity of the "Brazil" is established by the description of her given by Mr. Kutter (Ap. p. 119).—Mr. Griffiths' questions having been specifically directed to the Lloyd's Registry description.

Q. That is Fred Olsen & Co., Prinsengade, Christiania, Norway? A. Yes.

Q. They are the owners? A. They are the managing owners.

Q. Are they the managing owners for both the 'Brazil' and the 'Bayard'? A. Yes.

Q. And have been during all of that time? A. Yes.

Q. Did you submit to them the charters of both vessels, to Fred Olsen & Co. for approval? A. They are the only ones we correspond with.

Q. They are the only ones you correspond with? A. Yes.

Q. Do you know of any change in ownership, aside from the managing owners, during the period when you represented the 'Brazil'? A. Not to my knowledge'' (Ap. p. 118).

Furthermore, the two vessels were linked together in the negotiations for their hire which finally resulted in the chartering of both. These negotiations have already been fully discussed. The court will see from a survey of the telegrams constituting these negotiations (Ap. pp. 198-208) that the two vessels were always joined together and uniformly referred to as under the same ownership. Undeniably they were under the same managing ownership which is the material consideration. The phrases, ''Owners Bayard Brazil'', ''Owners Bayard Brazil cable today'', ''Agents receive word from London agents of owners'' occur repeatedly in those telegrams. The charters of both vessels were finally authorized by one cable from the owners (Ap. p. 215).

Since the agency, managing ownership and actual operation of these two vessels were in the same hands,

we submit that the idleness of the "Brazil" is under the authorities evidence that the "Bayard" would have been likewise idle, apart from the collision, and that no damages for demurrage are due.

What then was the precise situation respecting the "Brazil"? What use was made of the "Brazil" during the months of November and December, 1917? She came into San Francisco harbor about ten days after the "Bayard" and, although not involved in a collision, did not leave port until about the same day as the "Bayard", January 17, 1918 (Ap. p. 120). The idleness of this vessel for a period exceeding two months in the midst of the great war, when the United States and her allies were crying "Ships! More ships!", and the issue of the war was doubtful, is eloquent testimony to the attitude of her managing owners toward the United States which was trying to get every ship to sea under fair conditions.

The telegrams of McNear and the American Asiatic Company in December (quoted in an earlier portion of this brief), offering to charter the "Brazil" and the "Bayard", show the demand for vessels of this sort in the Pacific trade. We have, of course, no record of all the charter parties offered to her owners. Mr. Smull's records show an offer from W. R. Grace & Co. in November, which was as follows:

"San Francisco, Calif. 26
1917 Nov. 27 AM 2 40

"Chartering Committee.
U. S. Shipping Board, Custom House.
New York, N. Y.

Have cable advising foundering our chartered Norwegian steamer Thor en route to Orient and

essential we should replace this vessel to take care of homeward cargo urgently needed here stop *Norwegian motorship Brazil now ready here is offering for six months charter at sixty shillings Government form* we understand your Board will not approve charters trans-Pacific at *oncer* (over) forty-five shillings kindly advise us on this point and also advise us if it will be in order for us to charter Brazil for six months at forty-five shillings.

W. R. Grace and Co."

(Ap. pp. 210-211.)

The Chartering Committee's reply was not given by Mr. Smull but its general tenor is indicated in a second telegram from Grace & Co. a few days later—

"San Francisco, Dec. 6, 1917.

"Chartering Committee,

U. S. Shipping Board, New York.

Since our charter of Transvaal which you authorized Nov. 28th we have been looking for other tonnage to submit for your approval but the only suitable vessel we have found is *Norwegian motorship Brazil, and on offering this vessel forty-five shillings accordance your telegram November 27th owners replied they preferred waiting before chartering at this rate* stop * * *".

(Ap. p. 213.)

The "Brazil", it will be remembered, was finally chartered by McNear and sailed in January under the government time charter (at about the same time that the "Bayard" sailed), a trifle over two months after her entrance into San Francisco harbor. The high rates at which libelant computes the value of the "Bayard" in San Francisco at this time indicate the amount of damage which, according to *its* estimates, was sustained in *voluntarily* keeping the "Brazil" idle. Under the

circumstances, if libelant had succeeded in its claim for demurrage upon the "Bayard", it would seem unfortunate that the "Brazil" was not also in collision!

It is stated in libelant's brief that there is no evidence of attempts to charter the "Brazil" prior to December 7th (Brief p. 38). This is, of course, an oversight. The record shows Grace's telegram, dated November 27. Counsel for libelant also suggest (Brief p. 38) that the statements of third parties to the Shipping Board as to the reasons why the "Brazil" was idle are hearsay. But both the telegrams from W. R. Grace & Company (quoted above), in which this applicant for charters states that the owners of the "Brazil" are holding out for higher rates, purport to give the statements of the vessel's managers to Grace & Company and were a part of the Shipping Board's own records upon the chartering of this vessel. If these reasons are "hearsay" why did not libelant produce better evidence upon them? The case was not submitted until months after these telegrams were in evidence. If they were false, or gave fictitious reasons for her idleness, who knew and could prove their falsity better or more easily than libelant? But in the last analysis, the reasons for the "Brazil's" idleness need not be deduced from these or any other telegrams. Only one conjecture is natural. Actions speak louder than words. The idleness of the "Brazil", *unexplained by the libelant,* is more convincing than the telegrams which libelant now endeavors to disregard.

Why, indeed, did the "Brazil" remain idle?

Either she could not sail or she would not. From all the evidence in this case, it is clear that the "Brazil" was in a fit condition for sea and could have sailed during the period she remained in San Francisco harbor, if her owners were willing to use her and to charter her at government rates. They were not. Dozens of neutral vessels, like the "Brazil", lay at anchor in the ports of the United States during the winter of 1917, hoping that the Shipping Board would yield to their demands for higher rates. This has gone down into history, of which the court may take judicial notice. The "Brazil" was a neutral vessel in an American harbor at that time. Her idleness is unexplained. The fact that she was idle under all these circumstances justifies the inference that the owners of this vessel, like many other neutral owners, let the ship remain idle rather than yield to the rules of the Shipping Board.

The conclusion that the owners of the "Bayard" would have let her remain idle at this time is borne out by other facts in addition to the voluntary idleness of the "Brazil". While the liability for the collision was still undetermined and in doubt, the "Bayard" was undergoing repairs at the Union Iron Works. In the appendix to this brief, we consider the evidence concerning the method in which the repairs were prosecuted. Suffice it to say here that it will be shown that in this situation, the owners, uncertain whether they would have to pay the labor bills themselves, used neither double shifts nor overtime, so that the repairs were not completed until forty-eight days after the

collision. *This period could have been reduced materially.*

Furthermore, the vessel did not sail until the middle of January, three weeks or more after the repairs were completed. On this libelant's counsel has suggested that no definite plans could be made until the vessel's repairs were completed (Ap. p. 37, Brief p. 39). But the record, common sense and business judgment show otherwise. The offers received for chartering the ship did not specify any particular delivery date; ships were needed, and these charterers did not quibble over the exact date when the "Bayard" would be delivered to them. If the owners were willing and eager to charter their ships, why did they delay her completion, and also postpone negotiations for her charter, so that a further delay of three weeks was necessary after she was ready for sea? One answer, and only one, can be given. Uncertain whether or not they would themselves have to pay for the repairs, they saw no reason for incurring additional expense in expediting them, when they intended to keep the ship idle in any event. They had another vessel at hand and idle, permitted rates were lower than they wished to accept, and by holding out on both vessels they might in the end get a higher rate from the Committee. If eventually the respondent could be made to pay for the detention, so much the better.

By reference to the Appendix, point D, it will be seen that the repairs on the "Bayard" dragged from November 3rd to December 21, 1917. In this period there were six Sundays and a holiday on which no work was done. Libelant claims that the "Bayard" was

worth $4215 a day. At the time of the repairs liability for the collision was undetermined. Is it conceivable that if this was her real value and libelant intended sending the "Bayard" to sea it would have allawed the repair work to stop for seven days at a loss of $4215 a day— $29,505?

This inference is irresistible. We cannot put it better than the learned Judge of the District Court did in his opinion.

> "While the 'Bayard' was laid up for repairs the 'Brazil' was also idle in port although there was a great demand for ships and she could have sailed at any time at the rates fixed by the Board. The fact that she did not do so leads me to believe that the owners were unwilling to accept these rates, and preferred to wait in the hope or expectation of securing a more profitable figure. They were in fact unwilling to accede to the regulation of the Shipping Board in regard to rates, and seemingly desired to take their chance of getting higher rates later by leaving the ship idle during this period. If it were not for the voluntary idleness of the 'Brazil' I would allow demurrage to the 'Bayard' at the rate of forty-five shillings per deadweight ton per month for the period of thirty-four days. But as the owners preferred to leave the 'Brazil' idle when she could have been chartered at these rates, it is reasonable to conclude that they would not have accepted them for the 'Bayard' had she been in commission."

We discern in libelant's brief no effective answer to these findings. There is some general suggestion that the presumption of law is against a tort feasor, but as we have already shown, there is no such presumption in the sense contended, viz.: that libelant is relieved

of the burden of proving its damages. It is also suggested that the two vessels were owned by different corporations. But the managing ownership was the same for both of them and under *The Loch Trool,* 150 Fed. 459, even identity of management (to say nothing of managing ownership) warrants the court in drawing the conclusion that when one vessel is idle under similar circumstances, the other probably would be also. A managing owner is under the general maritime law, either a majority owner himself or a representative of the majority and as such operates the vessel for all of her owners. Unless in some way the control of the managing owner is definitely fettered by the other owners, his management of the vessel is untrammelled.* A managing owner is substantially a controlling owner. Here we have, first, identity of the managing ownership of the "Bayard" and "Brazil"; second, facts showing that both vessels were actually managed by this managing owner; third, nothing to show that his discretion was, so far as the "Bayard" was at any rate concerned, subject to any restrictions; fourth, actual discretion exercised on the "Brazil" to keep her idle during November and December, 1917, rather than sail her at Shipping Board rates. The "Brazil" was a vessel of the same type, in the same trade and in the same harbor as the "Bayard". The court we think very reasonably drew the inference of fact that the managing owner would have exercised his discretion with respect to the use of the "Bayard" in the same

*See definitions of managing owner in
The Wm. Bagley, 5 Wall. 377; 36 Cyc. 31, 36;
25 Am. & Eng. Ency. of Law 886; 26 Cyc. 124.

way as he exercised it in regard to the "Brazil". If in fact the managing owner of the "Bayard" did not have the same discretion in the operation of the "Bayard" as he had in the operation of the "Brazil" no one was in as good a position as the libelant to show that he did not, but no proof along those lines was offered and the record shows, it seems to us irresistibly, that the two vessels were grouped and handled together. After hearing and seeing all the witnesses whose testimony bears on the point, the trial court drew the inference that Fred Olsen & Company as the managing owner of the "Bayard" and the "Brazil" would have handled the "Bayard", had she been in commission, as they did the "Brazil", that is would have left her idle in San Francisco harbor during November and December, 1917, rather than yield to the Shipping Board rates of charter.

A shipowner who would not have used his vessel in any event is not damaged by the loss of her time while repairs are being made.

The rule of

The North Star, 151 Fed. 168,

applies. That was a case, it will be remembered, in which damage was claimed for the time during which one of a fleet of vessels was laid up for repairs. At the time she was injured, cargoes were being offered to the libelant's other vessels, but were refused because of the approach of winter, and one by one these vessels were being laid up for the season. It was held that no damage in fact was sustained by the North Star's detention since the reasonable inference was that the

opportunity for using the vessel would have been rejected, the rule being—

> "But if it appears affirmatively, or if the reasonable inference from the facts established is, that there was no opportunity or that he (the owner) would have rejected the opportunity, if offered, it is impossible for a court or jury to find legitimately that he had sustained actual loss."

So in

The Glencairn, 78 Fed. 379,

the libelant's vessel, the "Bedfordshire", was injured in a collision in Astoria harbor for which the claimant admitted liability. Claim was made for damages on account of loss of time during the period of repair. The evidence showed that she was in the harbor for a month before the collision and had declined charters at the market rate. Judge Bellinger gave damages in the amount tendered by the respondent for the physical damages, and disallowed the claim for demurrage.

(p. 383):

> "I cannot allow damages based upon the claim that the Bedfordshire was kept out of the market by reason of her injuries. The Bedfordshire was held for higher charters than were offered, and the market was a falling one. She was in the harbor nearly a month before the collision, and had declined offers for her charter as high as 35 shillings. She was, according to the testimony of Mr. Sibson, being held above the market. It is claimed that, at the date of the collision, and following, she was worth 32s. 6d.; but the testimony tends to show that she was held above that figure, and that the market continued to decline. She is not entitled to recover from the Glencairn the value of the market which she refused. She was

> not an exception in this regard. Other vessels equally valuable declined charters in the state of the market, and remained in port after the Bedfordshire had completed her repairs."

Similarly, in

The Loch Trool, 150 Fed. 429,

it was held that the unexplained fact that another vessel *under the same management* and engaged in the same trade was permitted to lie idle for months after the collision supported the conclusion that the owners of the injured vessel were not damaged by her enforced detention.

The decision in the last case is directly applicable in the case at bar. Either the war, or shipping conditions under government control at government rates, made the owners unwilling to use the "Brazil" during the months of November and December, 1917. She was a vessel of the same general type as the "Bayard" and engaged in the same trade. She was *under the same managment.* The only "reasonable inference from the facts established" is, that in view of the voluntary idleness of the "Brazil" at the very time the "Bayard" was being repaired, the detention of the "Bayard" did not damage her owners and that an award of demurrage for the period of her detention, far from *compensating* them for damages, would be an award of profits, which would not have been gained had the collision never occurred.

We ask attention again to the decision in

The Winfield S. Cahill, supra,

where it was held that the owners of a vessel which,

soon after the collision, was "blacklisted" by the Shipping Board, could not recover demurrage at her chartered rates. In other words, since they would not have used the vessel in any event, they were not damaged by her loss of time.

The rule of restitutio in integrum is intended to indemnify for injuries actually suffered, and not to award earnings which would never have been made. It is a canon of restitution, not of enrichment. We submit that the long-continued idleness of the "Brazil", the delay in arranging for a charter of the "Bayard", and in getting her off to sea after she was repaired, lead to but one reasonable inference of fact which is contradicted by nothing in the record. *The "Bayard" would have been kept idle, as the "Brazil" was kept waiting, to see whether by some turn of events the owners would become free to use their ship without governmental interference.* The collision interfered in no way with the owners' use of the "Bayard"—they were not damaged on the score of detention by having her laid up for repairs.

It clearly seems to us, as we have urged, that the burden of proof so called is with libelant to show its loss with reasonable certainty. It seems to us further, as we have also urged, that regardless of the burden the evidence in the record shows that the "Bayard" would not have been employed even if the collision had not occured. But even if (as we do not think is at all the situation) the case were left in equipoise, libelant would fail for the burden of proof in the true sense

is always with the moving party and on it rests the risk of non-persuasion.

> *Crowley Launch and Tugboat Company v. United States Shipping Board Emergency Fleet Corporation, et al.* (Case No. 3846 on the records of this court, decided June 19, 1922, but not yet, we believe, in the Federal Reporter.)

We venture to suggest that it "appears affirmatively" to use the language of the Circuit Court of Appeals for the Second Circuit in the North Star, supra, that there was "no opportunity" to charter the "Bayard" at the rate of the Moore charter and that libelant "would have refused the opportunity" at permitted Shipping Board rates. Those were the findings of the District Court. If they did not "appear affirmatively", at least they were (to use again the language of the North Star) "the reasonable inference from the facts established".

> *"But if it appears affirmatively, or if the reasonable inference from the facts established is, that there was no opportunity or that he would have refused the opportunity if offered it is impossible for a court or jury to find legitimately that he has sustained actual loss."* (Italics ours.)
>
> *The North Star,* 151 Fed. 168 at 175.

II.

THE FINDING OF THE DISTRICT COURT UPON CERTAIN DISPUTED ITEMS OF ALLEGED DAMAGE NOT INCLUDED IN THE STIPULATED PHYSICAL DAMAGES SHOULD BE AFFIRMED (Ap. pp. 307-313).

We stipulated with libelant to the physical damages at $58,096.15. Libelant claimed also the following items which we disputed, and the parties submitted them to the court's determination (Ap. pp. 309-310).

For Watchman T. Pentland on the "Bayard" from November 3rd to December 21, 1917; 49 days at $3.50 per day.....	$ 171.50
For Watchman Chas. Bergk on the "Bayard" from November 3rd to December 21, 1917; 49 days at $3.50 per day.....	171.50
For 3 tons of coal for cooking while the "Bayard" was laid up for repairs at $15.25 per ton	45.75
For wages for 30 men (members of the crew of the "Bayard") during the period of repairs, November 3rd to December 21, 1917; 49 days at $85.00 per day.....	4165.00
For victualling of said 30 men during said period of repairs, from November 3rd to December 21, 1917; 49 days at $30.00 per day	1470.00
Total	$6023.75

The court by its order (Ap. p. 311) and final decree (Ap. p. 311) disallowed these items.

Appellee protests (Brief, p. 49) that it fails to understand upon what theory. With the case decided as it was we have frankly never been able to understand on what theory libelant claimed these items. They are for expenditures for watchmen, for wages of the

"Bayard's" crew, for the victualling of that crew and for coal used in cooking—all during the period November 3rd to December 21st, 1917, when the "Bayard" was under repair after the collision. The court in its opinion found that the "Bayard" would have been idle during this period of repair regardless of the collision and that libelant was consequently not entitled to demurrage. It follows, therefore, that the foregoing expenses were not imposed upon libelant by the collision. They would have been incurred any way. The rule of damages in collision cases is *restitutio in integrum* and that rule does not require that the claimant should reimburse libelant for expenditures which were not caused by the collision.

We respectfully submit that the decree should be affirmed both in respect to the disallowance of demurrage and of the disputed items above mentioned. If the court should come to a different conclusion we ask reference to the appendix for determination of the amount of demurrage.

Respectfully submitted,

FARNHAM P. GRIFFITHS,
McCUTCHEN, OLNEY, WILLARD, MANNON & GREENE,
Proctors for Appellee.

(APPENDIX FOLLOWS.)

Appendix.

Appendix

CONSIDERATIONS WHICH ARE IMMATERIAL IF THIS COURT SHOULD AFFIRM THE DECREE OF THE DISTRICT COURT THAT NO DEMURRAGE IS RECOVERABLE.

These considerations become material only if this court should take a different view of the case and award demurrage, in which event they should be referred to in fixing the amount.

A.

If contrary to the finding of the District Court this court should hold the "Bayard" entitled to demurrage the damages therefor should not exceed her net earning power at the approved Shipping Board rate as this was her market value at the time.

B.

Damages for demurrage, if allowed at all, should not only be restricted to net earnings under the forty-five shilling rate (point A supra) but, as the trial court said, should be computed for thirty-four days only,—not for forty-eight days; the full period of repair, November 3rd to December 21st, as claimed by libelant. The "Bayard" had only just finished discharging her inward cargo when the collision occurred; the approval of the owners in Norway for new employment had to be secured by cable; and such cable approval could not have come in less than fourteen days. Regardless of the collision, therefore, the vessel would have been idle for fourteen days after November 3rd. If by any chance

damages should be based on the Moore charter, as claimed by libelant, the same reduction of days should be made because Mr. Moore made his offer only just prior to the collision, and cable approval had to be secured from Norway.

C.

The damages for demurrage, if any are allowed, computed at the forty-five shilling rate (Point A, supra) for a period of thirty-four days (Point B, supra), should be further reduced by allocating at least one-third thereof to the owner's (libelant's) account; so also if damages should by any chance be based on the Moore charter. This contention rests on an established rule both of American and English law where, as in this case, substantial repairs *not* necessitated by the collision are made simultaneously with those which *are* so necessitated.

D.

Libelant used neither overtime nor double shifts in repairing the "Bayard", therefore repairs were not prosecuted diligently for the mitigation of damages if the value of the "Bayard's" time runs into the enormous figures asserted by libelant. If damages should be awarded on the basis of the Moore charter there should be a reference to the Commissioner for computation of the saving that would have been made by diligent prosecution of the repairs. But this consideration is material only in the event of a reversal of the decree *in toto*.

A.

IF CONTRARY TO THE FINDING OF THE DISTRICT COURT THIS COURT SHOULD HOLD THE "BAYARD" ENTITLED TO DEMURRAGE, THE DAMAGES THEREFOR SHOULD NOT EXCEED HER NET EARNING POWER AT THE APPROVED SHIPPING BOARD RATE AS THIS WAS HER MARKET VALUE AT THE TIME.

The conclusion of the District Court was that libelant is not entitled to any damages for demurrage because, failing to have the Moore charter approved, it would have kept the "Bayard" idle in San Francisco Bay rather than send her out at the only rate which could have received the approval of the United States Shipping Board. That basic rate was, as we have shown, always insisted upon and constituted the *sine qua non* of every charter party, whatever discussion there might be by the Chartering Committee as to other details (Ap. p. 231). We have urged in the main body of this brief that the District Court was correct in disallowing any demurrage and that its decree to that effect should be affirmed. We now urge here that if the Distict Court should be found to have erred in denying demurrage, it was nevertheless correct in finding that the market value of the vessel, had her owners been willing to sail her instead of keeping her idle, was fixed by the time charter rate approved by the United States Shipping Board. Counsel for libelant admitted that damages for demurrage must be based on the market value of the vessel.

The market value of neutral vessels in American ports in November and December, 1917, was not determinable by the law of supply and demand but by the war regulations of United States government. Under war regulation the value of the "Bayard's" time was

her net earning power at forty-five shillings per deadweight ton per month, and no more.

We do not controvert the rule discussed fully by libelant's counsel that the market value for the use of a ship governs the amount to be awarded as damages, and that the shipowner, if entitled to recover at all, is entitled to recover at this market value when ascertained. But we disagree with counsel as to what the market value of the "Bayard" was at the time in question. They claim that the market value was determinable by the usual law of supply and demand, and that therefore the offer of the Moore Charter for $400,000, lump sum, fixes the "Bayard's" market value—this in the face of the evidence that neutral vessels from early in October, 1917, were permitted to sail from American ports only with the approval of the United States Shipping Board and at the maximum rate fixed and enforced by the Board, namely forty-five shillings per deadweight ton per month. The market value of the vessel had her owner not chosen to keep her idle was her earning power at that rate.

This collision occurred in the midst of the greatest war in history, at a time when governments here and in Europe were exercising extraordinary powers of control over matters not ordinarily subject to governmental authority. Under these conditions market value was not determinable by the same factors as in times of peace. The market price of the use of a vessel, like the price of sugar or flour, is regulated in ordinary times by the law of supply and demand, and this is the price, "market price according to supply and demand", according to

which the libelant declares his damages are to be reckoned. But war crises and war conditions brought into existence a new factor in determining the value of a ship. This was a governmental body which, regardless of limited supply and overwhelming demand, fixed rates according to certain policies. We need not here chronicle the rise of freight rates during the three years preceding the entrance of the United States into the World War, but the exorbitant prices and the vast profits of shipowners in the spring of 1917 can be judicially noticed by this court. That upon the entrance of the United States into the World War the long arm of the United States Shipping Board reached out to curb these profits and that within a few months it succeeded in reducing the current "market rate" of ships over forty per cent—these are matters of history and are in this record (Ap. p. 217). Libelant, in effect, is demanding a profiteering market price for the hire of its vessel during the months of November and December, 1917. But that price no longer depended on the individual wishes of the owner and those who desired to charter his ship, for the assent of the United States Shipping Board was then necessary to the legality of the price proposed. The old law of "market price according to supply and demand" is not the basis for computing the value of the "Bayard". The multiplier of ordinary times is changed to a divisor. "Market price according to supply and demand" has given place to "market price as permitted by law".

Under these circumstances the offer of the Moore charter meant nothing. In ordinary times libelant might have met its burden of proof respecting the damage sustained by the loss of the vessel's time

by showing that just prior to the collision, Mr. Moore had offered to charter the "Bayard" for $400,000.00. But this offer did not occur in ordinary times. It was made at a time when the United States Shipping Board, under ample authority, had assumed control of neutral vessels in every port under American dominion, and that Board's approval was necessary for all chartering or berthing of vessels, and its authority could be enforced by refusal of fuel supplies or clearance to neutral vessels until the approval was secured. The Moore offer was necessarily made subject to the approval of the United States Shipping Board. Mr. Moore, who made the offer, so testified (Ap. p. 20) and Mr. Kutter, the agent in San Francisco for the "Bayard", proposed to submit this very charter to the Shipping Board.

> "Q. You proposed to submit this particular charter with Mr. Moore to the Shipping Board, didn't you? A. We did.
>
> Q. And you understood that you would have to have the approval of the Shipping Board of that charter before the vessel could sail? A. That was the general understanding, that all the charters were to be submittted to the Shipping Board for their approval.
>
> Q. And that any charter, except one for your own account, would have to be submitted to the Shipping Board for approval? A. If I remember correctly that is the way it was" (Ap. pp. 121-122).

In these circumstances, as we have said, the *offer* of the charter meant nothing. The approval of the Shipping Board was the all important factor and, that approval, as has been shown in the main argument, could not possibly have been given to any charter

whatever its form, which as to rates was in excess of the basic rate prescribed and uniformly insisted upon as the *sine qua non* of all charters of neutral vessels (Ap. p. 230).

Suppose a railroad carrier sued a shipper for accrued freight charges, could it be argued that the law of supply and demand would govern the amount to be awarded? That the price agreed on between the parties should control the judgment! Assuredly the answer would be that this is a matter no longer subject to the law of supply and demand or to private agreement, and that the tariff fixed by the Government is controlling. Or to illustrate further. During the war the United States Food Administration fixed the prices of many of the staples of life which were ordinarily not any more subject to governmental control than the rate of hire of a ship. Could a seller of sugar bring suit to recover a price higher than the scale prescribed by the Government, presenting in support of the same an offer to purchase at the higher rate? In the case of the carrier and in the case of the sugar seller the law of supply and demand and of private contract would give way to the prices fixed by the Government.

So in this case, where the evidence is indisputable that the market hire of a vessel was no longer governed exclusively by the will of the owner and the charterer, but had to receive the assent of the Chartering Committee of the United States Shipping Board, and where the evidence is further that that assent would under no conditions be given for the period in question to a rate higher than the basic rate, the burden is on libelant

to show that the $400,000.00 Moore charter is within that rate. That burden, as we have pointed out, libelant has failed to sustain, not only to a reasonable certainty but to any certainty at all. And apart from burden of proof, the evidence is positive that under the Moore charter libelant would have earned more than double what he could have earned at the basic rate.

The Winfield S. Cahill, 258 Fed. 318,

is decisive of the point and confirms the foregoing reasoning.

The "Seguranca" was injured in a collision and had to be laid up for repairs. As the vessel was under charter at the time of the collision, her owner demanded demurrage at the charter rate. It appeared in evidence that the charter had not yet received, and would not have received the assent of the governmental authorities, in as much as she had been "black listed" by the Shipping Board. It was held that there was no reasonable probability that she would have earned her charter hire. Damages for detention were refused. In other words, the owner, although he proved the charter rate, could not show that it would have been approved. This case is one of the most recent upon questions of demurrage, and is also the first in which the question of governmental control, in its bearing upon demurrage claims, has been involved. We submit that the decision is controlling for this case.

Accordingly, the trial court expressed the view that damages if allowable at all would have been computed on the basis of the Shipping Board rate, namely forty-

five shillings per deadweight ton per month. The net earning power of the "Bayard" at this rate was $1650.40 per day (see page 59 supra where the computation is given).

The number of days for which demurrage should be allowed if at all is considered under the next heading.

B.

DAMAGES FOR DEMURRAGE, IF ALLOWED AT ALL, SHOULD NOT ONLY BE RESTRICTED TO NET EARNINGS UNDER THE FORTY-FIVE SHILLING RATE (POINT A, SUPRA) BUT, AS THE TRIAL COURT SAID, SHOULD BE COMPUTED FOR THIRTY-FOUR DAYS ONLY,—NOT FOR FORTY-EIGHT DAYS. THE FULL PERIOD OF REPAIR, NOVEMBER 3rd TO DECEMBER 21st, AS CLAIMED BY LIBELANT. THE "BAYARD" HAD ONLY JUST FINISHED DISCHARGING HER INWARD CARGO WHEN THE COLLISION OCCURRED; THE APPROVAL OF THE OWNERS IN NORWAY FOR NEW EMPLOYMENT HAD TO BE SECURED BY CABLE; AND SUCH CABLE APPROVAL COULD NOT HAVE COME IN LESS THAN FOURTEEN DAYS. REGARDLESS OF THE COLLISION, THEREFORE, THE VESSEL WOULD HAVE BEEN IDLE FOR FOURTEEN DAYS AFTER NOVEMBER 3rd. IF BY ANY CHANCE DAMAGES SHOULD BE BASED ON THE MOORE CHARTER, AS CLAIMED BY LIBELANT, THE SAME REDUCTION OF DAYS SHOULD BE MADE BECAUSE MR. MOORE MADE HIS OFFER ONLY JUST PRIOR TO THE COLLISION AND CABLE APPROVAL HAD TO BE SECURED FROM NORWAY.

The District Court disallowed demurrage but said that if it had been recoverable the period of allowance should be 34 days only. We submit that that conclusion was correct.

The "Bayard" finished discharging her inward cargo on the afternoon of November 3rd and the collision occurred two hours afterward (Ap. p. 18). Assuming the local agents to have opened immediate communications with Norway for permission to charter the vessel at the Shipping Board rate, it would have taken two weeks for a reply to come. Mr. Kutter, San Francisco agent for the "Bayard", testified:

> "Q. It would take you a couple of weeks to get cable communication with Norway, wouldn't it? A. When we cabled for authority to charter, yes" (Ap. p. 117).

The District Court, we think, very properly said that if damages for demurrage should be awarded to libelant on the basis of the "Bayard's" then market value (forty-five shillings per deadweight ton per month), the computation should be not for forty-eight days (November 3rd to December 21st, 1917), during which the "Bayard" was under repair, but for thirty-four days at the outside, as two weeks would necessarily have been required before a proposed charter could have been approved.

Similarly, if perchance the court should uphold libelant's contention that the damages should be based upon the Moore charter, the computation should be for thirty-four days instead of forty-eight. Mr. Moore's negotiations with the San Francisco agents of the "Bayard" were had "just prior to November 3rd with respect to the chartering of the motorship "Bayard" (Ap. p. 18). His offer of the $400,000 charter was made at that time (Ap. p. 19) and apparently the San Fran-

cisco agent had not, or had only just, cabled to Norway on it (Ap. p. 19). Two weeks, as pointed out above, would have been required for an answer (Ap. p. 117) and the charter could not have been executed before the authority came (Ap. p. 115).

The amount found due for the thirty-four days on either basis (Shipping Board rate or Moore charter) is subject to the further deduction on account of owners' concurrent repairs discussed under Point C infra; and in the possible event of damages based on the Moore charter there should be the further deductions for failure to diligently prosecute repairs, discussed under Point D infra.

These deductions and indeed the calculation of demurrage generally, if this court should take such a view of the case as to make any demurrage recoverable, will, it may be assumed, go to a reference in the usual way after the mandate goes down to the court below, and, therefore, we do not go into figures here.

In

The Saginaw, 95 Fed. 703,

a passenger vessel injured in a collision was delayed three days for necessary repairs. It appears that despite this delay the vessel completed her voyage to Hamburg in ample time for her scheduled return seven days later. The referee allowed damages for this period, but on exceptions to his report the court disallowed the claim for loss of the use of the vessel, holding that compensation for this period, when no actual damage was shown, was not within the rule of *restitutio in integrum.*

This deduction is comparable to that made by Judge Morrow in

The Rickmers, 142 Fed. 305,

where the injured vessel was laid up for repairs for ninety days. The rate of demurrage was based upon the net earnings of the vessel during a voyage of sixty days. It was held that for every voyage of sixty days there would have been an average of fourteen days in the ports of loading and unloading and that such period ought to be deducted from the total number of days during which the ship was laid up for repairs. The respondent paid demurrage on seventy-four days only instead of ninety days as claimed by libelant.

Under the authority of this case the claimant herein should not be charged demurrage rates for the interval of two weeks during which the agents would have been obliged to keep her idle awaiting instructions for the Norwegian owners.

C.

THE DAMAGES FOR DEMURRAGE, IF ANY ARE ALLOWED, COMPUTED AT THE FORTY-FIVE SHILLING RATE (POINT A, SUPRA) FOR A PERIOD OF THIRTY-FOUR DAYS (POINT B, SUPRA) SHOULD BE FURTHER REDUCED BY ALLOCATING AT LEAST ONE-THIRD THEREOF TO THE OWNER'S (LIBELANT'S) ACCOUNT. SO ALSO IF DAMAGES SHOULD BY ANY CHANCE BE BASED ON THE MOORE CHARTER. THIS CONTENTION RESTS ON AN ESTABLISHED RULE BOTH OF AMERICAN AND ENGLISH LAW WHERE, AS IN THIS CASE, SUBSTANTIAL REPAIRS NOT NECESSITATED BY THE COLLISION ARE MADE SIMULTANEOUSLY WITH THOSE WHICH ARE SO NECESSITATED.

The District Court found that repairs not necessitated by the collision were carried on with those so

necessitated—in other words, found the fact—but concluded it to be an immaterial feature in the view that the court took of the case, namely, that no demurrage was due. It becomes material only if demurrage should be allowed.

While the repairs necessitated by the collision were under way, the owners made extensive repairs on their own account which had nothing to do with the collision. The repairs thus made by the owners on their own account were substantial and of benefit to the ship. The dynamos were "stiffened up", new foundations were installed under the auxiliary engines, repairs were made on pipes, the cylinders were opened up and new piston rings were fitted in; the cross-head brasses were refitted and the crank pin brasses examined, the engines overhauled and accumulated dirt and grease removed, in addition to a variety of smaller jobs. Testimony on these repairs was given by the surveyors Mr. Blackett (Ap. p. 260) and Mr. Evers (Ap. pp. 276-277) and by Mr. Siversen, General Superintendent at the Union Iron Works (Ap. pp. 293-296). All these repairs were for the owner's account and none of them, not even the overhauling of the engines, were necessitated by the collision.

The importance of these repairs and the length of time taken in making them can be estimated by the size of the Union Iron Works' bill. This was approximately $20,000.00, although a great part of the work in overhauling the engines was done by the engineers and crew of the vessel and their work of course was not included (Ap. p. 295).

While two sorts of repairs are going on simultaneously for the account of two different persons, justice requires a division of the common expenses. And that is the rule. Both American and English courts apportion the value of a vessel's time when both the owner and a *tort feasor* are repairing her while she is laid up.

In

The Sequoia, 132 Fed. 625 (9th Cir.),

the "Cleveland" was laid up for ten or eleven days for repairs due to a collision with the "Sequoia". The owners made other repairs not necessitated by the collision but of a substantial character and of benefit to the steamer. *They did not interfere with or delay the repairs resulting from the collision. Nevertheless, Judge De Haven held that the owners could not recover demurrage for the whole period but that the value of the use of the ship for the period of detention should be divided.*

> "The owner is entitled to demurrage for the time that the vessel is necessarily detained while undergoing such repairs; that is, he is entitled to the value of the use of his ship during that period. But manifestly, this rule would not be just under the peculiar circumstances of this case, because a portion, if not all, of the time she was delayed on account of the collision, the 'Cleveland' was undergoing other repairs which were beneficial to her. *It may be that these repairs would not have been made at that time except for the fact that the steamer was under detention because of the injury received by her in the collision with the 'Sequoia', but, nevertheless, the repairs made were substantial, and must have had to have been made in the near future. To allow the owners of the 'Cleveland' to recover the entire value of her use during the*

> *time they were made would really place them in a better position than if the collision had not occurred.''*

The principle thus recognized by Judge De Haven was followed in

The John F. Gaynor, 124 Fed. 743; 130 Fed. 856,

where it was held that the cost of a survey occasioned partly by damage done by collision and partly by stress of weather must be apportioned between the owner and the respondent.

Similarly, in

The Bratsberg, 127 Fed. 1005,

it appeared that repairs not necessitated by the collision were made at the same time as the collision repairs. It was held that this required a division of the cost of the survey and the docking charges.

> ''But I think that the cost of the survey and the docking charges ought to have been divided. Other repairs not made necessary by the stranding were made at the same time and the English rule which divides the charges under such circumstances seems to be fair and equitable. (Marine Ins. Co. v. China Steamship Co., 6 Asp. M. C. 68, 11 App. Cas. 574; Ruabon v. London Assurance Co., 8 Asp. M. C. 346) and it was followed in this district in the unreported case of the Atlas v. Le Lion No. 77 of 1895.''

The leading English case (cited in *The Bratsberg,* supra) is the case of

Marine Insurance Co. v. China Transpacific S. S. Co., 11 App. Cas. 573.

The ''Vancouver'' sustained a fracture of her sternpost by perils of the sea but this damage was not dis-

covered until the ship was put in drydock by the owner to be cleaned, scraped and painted. The ship was discharged in eight days, the cleaning, etc., being completed in the first three days, whereas the repair of the stern-post required the whole eight days. The question then arose whether the drydock charges for the first three days ought to be apportioned between the owner and the insurer, for, if it was, there would be a particular average loss within the policy of insurance. It was held that the drydock charges for the period during which the ship was being cleaned and painted should be apportioned between the owner and the insurer. Lord Justice Fry states the reason for the rule:

> "Now, although it is quite true that the insured are carrying on the two operations, together, yet they may fairly be treated as if they were separate persons, because the insured are carrying on one operation at their own expense and risk, and they are carrying on the other operation with a right to be indemnified by the underwriters.
>
> Where the circumstances are such that there are two persons, one of whom has a distinct object in view, which he can only accomplish at a certain expense, and if both of these persons concur together, they can each accomplish their separate object at the same expense as would have been incurred by each of them if they had done it separately, there it appears to me, the simple ordinary rule—the rule of justice and equity—is, that the total expense which has been incurred in their doing their acts together, and which would have been incurred by each if they had done it separately, shall be divided between them. This appears to me to be one of the cases in which the well known maxim, 'Equality is equity', applies."

The authority of this rule was recognized in the case of

Ruabon S. S. Co. v. London Assurance Co., (1897) 2 Q. B. 456; 1900 App. Cas. 6.

Here the shipowner took advantage of the ship's presence in drydock for repairs to have her surveyed for the purpose of reclassification in Lloyd's. The insurers contended that the shipowner was bound to contribute to the expense of the drydocking as he had derived material benefit therefrom. Justice Mathew held that the cost should be divided equally. On appeal he was reversed and it was held that the insurer must pay the whole dock charge. The rule on which we are insisting was, however, recognized; the reversal was on its application to the facts. The case of

Marine Insurance Co. v. China Transpacific Co., supra,

was distinguished because in it both operations were essentially necessary to the ship, whereas in the "Ruabon" case reclassification was not necessary at the time as the existing classification had nine months more to run. Under the American rule, as we point out later, the distinction is immaterial; all that is required for apportionment of the demurrage is that the repairs for owner's account shall have been of substantial benefit to the vessel and this was undeniably the fact in the instant case.

In

The Acanthus, 85 L. T. (N. S.) 696,

a collision between the "Acanthus" and the "Bohemian" made it necessary to put the "Bohemian" in

drydock for repairs. Although she was a new ship, the owners had been contemplating putting in new bilge keels before the collision, and therefore decided to do it while she was in drydock. Putting in the new keels did not retard the repairs. The owners of the "Acanthus" urged that the docking and demurrage charges should be divided. Justice Jeune thought that the case came under the rule of the "Ruabon" case, supra, instead of that of the Marine Insurance case, but was of the opinion that if the new keels had been necessary, the charges should have been divided.

> "But perhaps it only comes to this, that where there is an obligation, or where the cases arises that the vessel has to be repaired—or to use Lord Bromton's phrase, where there are two things necessary to be done one by one person and one by another—if they are done at the same time then the cost, so far as it is common to both, may well be shared by them. But the point is that two things are obligatory by reason of contract or duty. I can easily understand if it had been shown in this case, that the bilge keels were a necessity and the vessel could not go to sea without them, it might be said that the owner was under an obligation to fit them, and if he had been under any obligation, and if, at that time he had put the vessel into drydock, it might be said it was as much on his own behalf as on behalf of the owners of the 'Acanthus'."

The "Acanthus" was the case cited by Judge De Haven in

The Sequoia, supra.

He disapproved the distinction followed in the "Acanthus", however. The test which he applied as the American rule was whether the repairs were sub-

stantial and of benefit to the vessel. If so, equity, in his opinion, required a division of the demurrage charge.

In the case now before the court repairs made for the owner meet the requirements of both the American and the English judges. They were substantial and of benefit to the vessel within Judge De Haven's rule and many of them were necessary for the safety of the "Bayard" as required in the later English cases. The law requires therefore an apportionment of the claim for demurrage between the libelant and the claimant.

If this matter of a deduction on account of concurrent owners' repairs becomes material, its amount, we suppose, will be referred for determination to the Commissioner in the usual way. Suffice it to say here that the deduction is and will be a matter of real moment if demurrage is to be allowed, as the repairs for owners' account aggregate some $20,000, and the total stipulated physical damages for which we are responsible are only $58,096.15, so the deduction should be somewhere in the neighborhood of a third of the demurrage.

D.

LIBELANT USED NEITHER OVERTIME NOR DOUBLE SHIFTS IN REPAIRING THE "BAYARD". THEREFORE THE REPAIRS WERE NOT PROSECUTED DILIGENTLY FOR THE MITIGATION OF DAMAGES IF THE VALUE OF THE "BAYARD'S" TIME RUNS INTO THE ENORMOUS FIGURES ASSERTED BY LIBELANT. IF DAMAGES SHOULD BE AWARDED ON THE BASIS OF THE MOORE CHARTER THERE SHOULD BE A REFERENCE TO THE COMMISSIONER FOR COMPUTATION OF THE SAVING THAT WOULD HAVE BEEN MADE BY DILIGENT PROSECUTION OF THE REPAIRS. BUT THIS CONSIDERATION IS MATERIAL ONLY IN THE EVENT OF A REVERSAL OF THE DECREE IN TOTO.

The authorities.

In

The Fannie Tuthill, 17 Fed. 87,

the court said:

> "The right of the injured party to be indemnified for the loss of the use and service of his vessel during the period required for making his repairs is also recognized; *but it should only include the minimum time required for that purpose,* and this should fall wholly within the season of navigation, or within which, but for the injury, his vessel could have been profitably used."

Cheap methods of repair at an unjustifiable expenditure of time were condemned in

The Sovereign of the Seas, 139 Fed. 812.

Libelants had certain repairs to a barge made at a cost of $882.92. The sum of $1485 was demanded for the thirty-three-day detention for the repairs. The barge was not, as she could have been at saving of time, put in drydock or on a marine railway. The repairs

were cheaply done but at a considerable loss of time. It was held that libelants were not entitled to the sum they claimed.

> "While it may be doubtless true that this method of doing the work was cheaper, it does not follow that it could not have been performed more expeditiously, and it is with the matter of the time it took to do the work that we are now dealing. The libelants reiterate the fact that they were economical in making the repairs, because they did not know at the time on whom the loss would fall, as the fault of the collision had not been settled,* but it by no means appears that they were in a hurry in doing the work, as they might not at that time have been busy with their barge; and if they could be allowed full demurrage for all the time consumed by the slow method adopted of doing the work it would result in quite a remunerative plan of doing business. They are not entitled to and should not receive demurrage for any such length of time as is charged here upon any principle upon which allowances of that character are made."

Similarly, in

> *Columbia Dredging Co. v. Brooks Co.*, 163 Fed. 362,

the court commented upon a demand for fifty-one days' loss of time at $17.12 per day, whereas the cost of the work covering the same period was $9.12 a day, as "giving the respondent a handsome bonus for keeping the scow in the repair shop, instead of in the water".

So the authorities run. We next consider their application to the case before us.

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*This was the situation in the case at bar when the repairs for the collision were being made. Liability for the collision was then in issue.

The situation in the case at bar.

Repairs on the "Bayard" were commenced November 9th and completed December 21st, 1917,—43 days (Ap. pp. 259, 261, 262). Straight time only was used except for three days' overtime on the drydock (Blackett, Ap. p. 260). There are two devices by which many days' time could in such circumstances have been saved: first overtime (sometimes called the double shift,—see, for instance, Blackett, Ap. p. 260), that is to say, continuing the same day crew at work into the night; second, two separate shifts of men, one working by day and the other by night (Ap. pp. 260-263).

If as libelant claims the "Bayard's" market value was $4215 a day, it was peculiarly incumbent upon libelant to mitigate the damages and get her to sea. Had the repairs been speeded up, as we submit they very easily could have been, a great saving would have been accomplished.

The figures will naturally go to a reference if this consideration becomes material. Suffice it therefore to say here, in passing, as an indication of the substantial character of the saving, that we calculate, roughly, after allowing for the additional labor cost, a net saving by the use of double shifts of $104,722.31.

Libelant argued below that the men for a second shift were not available and relied on the testimony of Mr. Siversen. But we question the correctness of his recollection as to the situation at that time, for he testified also that double shifts could usually be provided where the case was really urgent (Siversen, Ap. p. 291), and this was a case of utmost

urgency if the "Bayard's" time was worth what libelant claims for her. *And Mr. Siversen in fact provided extra men for work on the "Bayard's" engines at the same time that the repairs covered by the specifications were being prosecuted* (Siversen, Ap. p. 295). *Therefore, he could have given extra men for those repairs.* We accordingly contend that two shifts could and should have been used.

But if they could not, overtime could. The record is clear on that. And we calculate that, after allowing for the additional labor cost, overtime would have yielded a net saving of $69,129.77.

Our calculations of the figures of saving by use of double shifts or overtime are of course only approximate and are given here simply to indicate that the savings would have run into very real figures and should have been made if the value of the "Bayard's" time were to be set at the great price claimed for her. Neither the points nor the figures are of any interest unless there should be a reversal of the decree in toto, in which event the calculation of the amounts will naturally go from the court below to the Commissioner. In other words, we do not name these figures as in any sense established now.